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The oldest law monthly in the United States, the well known *Green Bag*, of Boston, has been acquired by the Central Law Journal Company, from and after the beginning of the year 1915. By arrangements, now fully completed, the *Central Law Journal* secures the benefit of the good will and the subscription list of the *Green Bag* and will fulfill its subscription contracts from this date.

The *Green Bag* is the elder brother of all the monthly law magazines in this country, having been established twenty-seven years ago. The *Central Law Journal* is older than this, enjoying the distinction of being the oldest law weekly of general circulation in the United States. The joining of hands of these two well known periodicals will give added strength to the *Central Law Journal,* and should place it clearly in the forefront of the independent legal press.

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Our profession demands, we think, a law weekly rather than a monthly or a quarterly. Such is the experience both in England and in this country. The news of important decisions and of important professional movements must be fresh and crisp each week. This has always been our policy and it will be continued during the coming years.

We are gratified to be able to announce that the former editor of the *Green Bag,* Mr. Arthur W. Spencer, of Brookline, Mass., has been added to our staff of editors. Its readers, therefore, will not be wholly deprived of Mr. Spencer's very interesting and scholarly contributions to current legal literature.

We extend a very hearty and sincere welcome to the new subscribers this day added to our mail list, and express the hope that we may be able to interest and instruct them at least fully as well as did the *Green Bag,* our erstwhile and much esteemed contemporary.

FLIGHT BY A THIRD PERSON PRESENT AT A HOMICIDE AS EVIDENCE IN BEHALF OF AN ACCUSED.

The principle declared by a majority of the Federal Supreme Court in Donnelly v. U. S., 228 U. S. 243, treated in 76 Cent. L. J. 369, that a confession by a third person, that he had committed the murder charged against an accused on trial, was inadmissible under the hearsay rule, has been applied by Iowa Supreme Court to a case of flight of a third person from the scene of crime. State v. Pierrot, 149 N. W. 446.

The Iowa court, in making this ruling, says: "It is said that the court should have instructed on the theory that the flight of Louie Tomsic should be considered as substantive testimony bearing upon the defendant's guilt. It is now very well settled that confessions of a stranger, admitting the commission of a crime, are not substantive testimony which may be used by another who is charged with the offense. Donnelly v. U. S., 228 U. S. 243, Am. Cas. 1913E, 710, and the many cases therein cited. * * * Flight, if proved, is nothing more than a confession by another, and the defendant was not entitled to the use of this testimony in his own defense."

Our former discussion was largely an agreement with the views expressed in the dissenting opinion by Mr. Justice Holmes, and even if the law as expressed by the majority in the Donnelly case be, as the Iowa case says, "well-settled," it seems to us it should not be extended to such a case as was before the Iowa court, though generally, it may be true that "flight, if proved, is nothing more than confession by another."

First, it appears from this case that the evidence showed a fight which resulted in an altercation with the fugitive. This fight took place about daybreak and deceased was first struck on the head by rocks thrown by the fugitive and a few moments afterwards he was struck a heavy blow by defendant, which the state claims fractured the skull. At all events, before this blow was given, deceased's head and face were bloody and he fell on being struck by a board or stick in the hands of defendant. This board or stick was not produced on the trial, having been lost or burned. Defendant's witnesses say it was a thin, pine stick. Tomsic, who struck deceased with rocks, fled the country at once.

Under these circumstances it seems to us that this flight was important evidence as aiding in interpretation of the *res gestae* of the difficulty, its importance to be determined by the jury. It rather resembled an admission made *dum fervet opus* by an actor in an affray than as a confession of guilt.

But, if we take it as a confession of guilt, it is made so immediately in connection with the occurrence of the killing that exclusion makes a more virile application of the hearsay rule than was applied in the Donnelly case. And it had about it a spontaneity, which should have let it in though it might not strictly be regarded as *res gestae*. It was a character of evidence not barred out as a studied self-serving act.

Secondly, the rule applied to flight, is that, while it is admissible as presumptive evidence of guilt, requiring explanation by an accused, yet it presupposes the presence of the accused at or near the scene of the crime before he flees. It is a part of the state's case to prove this. This is not so as to a confession, though its falsity might be shown by the state proving an alibi, if desired to rebut it. Therefore, a confession by a third person alleging not only his commission of an offense, but the identical one charged and his presence there, seems very different from a showing that another who might have committed the offense fled from the scene of the crime.

If the testimony showed him present but his movements are all accounted for as not being connected with the commission of an offense, the presumption arising out of flight would be minimized or wholly dissipated. If the flight were immediate or after it was shown that evidence was discovered which tended to connect the fugitive with the crime, flight tends to weaken, at least, the motive ascribed to another in the commission.

Suppose, again, there were a question of identifying the slayer, would not this illustrate the issue? Or, as in the instant case, of attributing to one of two blows, a mortal effect, would not the flight of the deliverer of one of the blows, help the jury to say whether the instrument used by him was calculated to inflict a mortal wound?

We might go on speculating as to this in various ways, and finally we would get back to the question whether flight may have any bearing on the circumstances in the commission of a crime independently of its being in the nature of a confession by a third person.

To make a confession of crime imparts thorough deliberation; to resort to flight may be different. One is to invoke consequences upon remorse; the other is to escape such consequences. One is to say something in the interest of another; the other is to do something in one's own interest. There are many imaginable and different standpoints from which the two things may be regarded, but principally one is a mental, and the other a physical, fact.

At all events, however, the hearsay rule, which excludes the confession of a stranger so as to exonerate an accused, has various exceptions, and one more ought to be, where there is difficulty in explanation of the *res gestae* in proof of a crime.

Finally it is to be said that the rule in the Donnelly case applies to extra judicial confessions, and it is rather difficult to think of an extrajudicial flight. There is flight which relates to a fleeing from the scene of a crime that is charged or it is no flight that is in any way to be regarded. When we say that an extrajudicial confession is to be rejected, this implies that an admission testified to in a case is competent. But flight as a fact may be testified to by any witness.

NOTES OF IMPORTANT DECISIONS

CONTRACT — PAROL EVIDENCE TO SHOW CONDITIONAL DELIVERY OF WRITTEN ORDER.—We are familiar with the rule that a note, bond, or deed may be shown by parol evidence to have been delivered upon condition that it shall not go into effect until the performance or occurrence of some act or event. To apply this principle to an unconditional written order for goods to be presently delivered, or in due course, dependent on obtaining the approval of another member of a partnership, no time being specified for consent to be manifested, appears to us to be straining the principle. This, however, was held by Mississippi Supreme Court in Ohio Pottery & Glass Co. v. Pickle & Son, 66 So. 321.

The facts of this case show that a traveling salesman applied to the junior member of a firm for an order for goods and obtained it "upon the understanding and agreement that if his father was not willing for him to make the purchase then the order could be countermanded."

The statement by the court further shows: "That his father would not approve the order and notice thereof was given to the appellant, None of the goods were accepted by the appellees."

Nowhere in the opinion of the court does it appear when the notice spoken of was given, whether before shipment or arrival of the goods or afterwards.

In this case it certainly was obligatory on the firm promptly to renounce the order. It had no right to await the incurring by the seller of expense of shipment, and there seemed nothing in the understanding that the seller should delay shipment. The principle announced was sound, but whether its application was cut out by the facts is not shown.

DAMAGES—NON-ANTICIPATION OF INJURY TO LICENSEE SHOWN BY NEGATIVE TESTIMONY.—The case of Louisville & N. R. Co. v. Lawson, 170 S. W. 198, decided by Kentucky Court of Appeals, shows a reversal of a judgment where a licensee standing near a railroad track was drawn, by motion of a passing train, under the train and the toe on the left foot and his right foot and ankle crushed.

The court said the question presented was: "Does a railroad company owe to a licensee walking near its tracks and who knows of the approach of the train, the duty of slacking the speed of its trains in order to prevent him from being sucked under the train?"

By way of showing that the suction could not be reasonably anticipated, the court said:

"While it may be true that evidence of witnesses that they had never heard of a particular accident does not show that such an accident had never happened, or that it should not have been anticipated (Trinity & B. V. Ry. v. McDonald, Tex. Civ. App., 160 S. W., 984), yet this rule, we take it, is not without qualification. Every day hundreds of trains are run at the rate of 25 or 30 miles an hour. These trains pass hundreds and, perhaps, thousands of persons standing within five or six feet of the track. If the suction from trains were great enough to draw persons under the trains there would have been innumerable accidents of the kind under consideration. Notwithstanding this fact, several railroad men, who certainly had an opportunity to speak from long experience, say that they never heard of a live object, capable of resisting, being sucked under a train. Not only so, but the only two cases that have ever come before the court, so far as we know, are the case under consideration, and the case of Graney et ux. v. St. Louis, I. M. & S. Ry. (167 Mo., 666, 57 S. W., 276, 50 L. R. A., 153), where a recovery was denied on the ground that the accident, even if it took place as claimed by plaintiff, was not one that might have been reasonably anticipated. Where in a case like this it is contended that the accident was the result of the negligence of the railroad company, combined with the operation of a natural law, and where not only the character of the accident, but the conditions attending the everyday operation of trains, are such that the accident would have frequently happened if the natural laws were such as to make it possible, we conclude that evidence to the effect that no such accident had ever happened has a strong and important bearing on the question whether or not it should have been reasonably anticipated."

It has been decided quite often by courts that testimony opposed to physical facts, of which the court may take judicial notice, may, though uncontradicted otherwise, be disregarded by courts or juries. In this case, however, merely negative testimony, so far as anticipation of a natural law producing its consequences is concerned, is to have effect.

The court may be right in its conclusion, but we greatly doubt whether the negative testimony ought to have been received. Judicial cognizance attaching to the subject at all should have been sufficient for its complete determination. A better ground to have rested the conclusion on would have been that it was not apparent that suction would operate to the extent necessary to draw a human being situated as plaintiff was under the train, nor was it apparent to the engineer what resistance or the strength thereof would be made by the licensee. There were more factors in the proposition than the natural law of suction itself.

APPEAL AND ERROR—REVERSAL FROM THE AGGREGATE OF ERROR IN DIFFERENT PROPOSITIONS.—In 79 Cent. L. J. 3, we treated the question of "Disposition of a cause without any specific ruling" by a majority of the court, therein contending that if a majority of the court agreed on no one ruling for reversal, a cause ought to be affirmed, the other rule confusing all precedent about what a case decides and appellee even sustaining the court below as to each and every assignment of error.

In Price v. State, 170 S. W. 241, decided by Arkansas Supreme Court, the opinion for reversal is written by the chief justice, who thought the case should be affirmed.

In it he states the views of three of the five members, one of the other two agreeing with the writer of the opinion. In it he says, in conclusion, that:

"The views here expressed concerning the several propositions involved in this appeal are those of a majority of the judges, and if these statements of the law upon each of the assignments of error were shared by the same judges, constituting a majority on the separate questions involved, an affirmance of the judgment would necessarily result; but such is not the case, for some of the judges agree upon some of the conclusions here stated and disagree as to others, which brings about a result that while a majority of the judges agree upon the propositions of law which would affirm the case, a majority of them for different reasons vote to reverse it. Two of the judges (Wood and Hart, JJ.) are of the opinion that the court erred in giving instruction No. 10, and that the judgment should be reversed and the cause remanded for a new trial. Mr. Justice Hart is also of the opinion that the court erred in refusing to give instruction No. 16, requested by defendant. Two of the judges

(Wood and Smith, JJ.) think that the court erred in refusing to give the defendant's requested instruction on the subject of reasonable doubt and that this constituted error which calls for a reversal of the judgment for murder in the second degree and a reduction of the degree of the offense to manslaughter, as this instruction relates only to the degrees of homicide and not to the question of guilt or innocence. Mr. Justice Kirby and the writer are of the opinion that there is no error in the record and that the judgment should be affirmed. While the law of the case is settled by the concurring views of the judges, as expressed in this opinion, the only net result which can be extracted from the divergent votes of the judges upon the question of affirmance or reversal is that the judgment for murder in the second degree must be reversed, but that the cause should not be remanded for a new trial if the attorney-general elects to let the judgment stand as to the degree of manslaughter. This condition results from the fact that while three of the judges vote to reverse the judgment for murder in the second degree, only two of them vote to remand the cause for a new trial, and the vote of the other one, together with the two judges who think the whole judgment should be affirmed, prevents a remanding for a new trial if the state is willing to let the conviction for the crime of manslaughter stand (Pollock v. Hennicke Co., 64 Ark. 180, 46 S. W., 185; St. L., I. M. & S. Ry. v. Adams, 74 Ark., 326, 85 S. W., 768, 86 S. W., 287, 109 Am. St. Rep., 85; Carson v. Ft. Smith Light & Traction Co., 108 Ark., 452, 158 S. W., 129).

The judgment of the circuit court is therefore reversed and set aside in so far as it adjudges the defendant guilty of murder in the second degree, and the cause will be remanded for a new trial unless the attorney-general elects within fifteen days to stand upon a conviction of voluntary manslaughter, in which case the cause will be remanded, with directions to the circuit court to fix the punishment and sentence the defendant for the crime of manslaughter."

It seem to us that here is almost an admission that this kind of reversal takes away a right without due process of law, that is to say, that though no error on any one proposition is adjudged by a majority there is effect

THE JOKER IN THE FEDERAL EMPLOYERS' LIABILITY ACT.

"Can such things be,
And overcome us like a summer's cloud,
Without our special wonder?"

On April 22, 1908, President Roosevelt gave the executive approval to the act of Congress which is popularly known as the Federal Employers' Liability Act. This measure was generally hailed as the culmination of a national movement, the object of which was to take the edge off the sharper features of the common law, as its principles operate to restrict the liability of the railroad companies for injuries sustained by their employes in the course of the master's service.

The act, in its original form, became a law on June 11, 1906. The act of 1908, by which it was in effect amended, was the response of Congress to the case of Howard v. Illinois, etc. R. Co.[1] The Supreme Court of the United States in this case declared the terms of the act too comprehensive, and the act unconstitutional in that according to the provisions of the bill in its original form, it affected railroad companies in respect to their relations as interstate and to their relations as intrastate carriers, as well. It was in this particular held too broad.

The act of April 22, 1908, therefore, was framed to meet this objection. In the case of Mondou v. N. Y. etc. R. Co.,[2] the constitutionality of the latter act was affirmed.

On April 5, 1910, the act of April 22, 1908, was amended in certain particulars, which are unimportant for the purposes of this discussion.

The act of Congress is by reason of the supremacy of the Federal Congress withdou v. N. Y. etc. R. Co.[3] In point of fact, in the more modern expansion of the railway systems of the United States, it is difficult to conceive of the case of an employe whose function or office relates solely to intrastate traffic, and is not in some aspect at least concerned with commerce between the states. The Supreme Court of the United States shows no disposition to circumscribe the scope and application of the act, holding in the case of Pedersen v. Delaware etc. R. Co.[4] that an iron worker on his way to repair a bridge was to be regarded as engaging in interstate commerce, in virtue of the fact that the bridge itself upon which his services were to be performed was part of an interstate highway, although a highway for intrastate traffic, as well, and has given to the statute an interpretation which renders it well nigh universal in its extension.

A distinguished Federal Judge long ago foresaw the sequel as it respected the so-called Federal Safety Appliance Acts[5] of a kindred character with the act under review, and in disposing of the contention that the result of the free construction of these acts would in effect make it eventually impossible to postulate a case of delinquency which in virtue of such a construction would not be within the purview of the acts as arising out of an interstate transaction, frankly declared that such an apprehension "neither terrifies nor convinces."[6]

Already there had been overwhelming evidence that the exact principles of the common law were become too harsh in their operation under the complex conditions of modern industrial organization to be longer tolerated in their unyielding rigor. Even the judges who were called upon to apply its principles recoiled from the injustice which they involved, and more than one court has doubtless sympathized with the indignant remonstrance of Lord Esher to which he gave expression in the case of Yarmouth v. France:[7] "It is to my mind a horrible way of stating the duty to say that the master owes no duty to the servant who knows that there is a defect in machinery, and having pointed it out to one in authority, goes on using it. It seems cruel and unnatural, and, in my view, utterly abominable."

In referring to these utterances of the great English jurist, Jaggard, J., in Rase v. Minneapolis,[8] declared that the common law in those phases upon which Lord Esher had so bitterly commented, was as absurd as it was artificial. Says he: "The reasoning by which it is sought to be justified, carried to its logical conclusions, tends to result in this paradox: the more grossly is the master negligent, the more certain is the assumption of the risk by the servant, and the master's exoneration. If the master be more careful, then the more doubtful is the servant's assumption of risk, and the more probable is the master's liability. The employer who is successfully careful and he who is extremely careless are equally protected. The exercise of care is discouraged, and a premium is put on negligence."

For many years, accordingly, the conviction had been deepening in the minds of men that the system of jurisprudence which placed the bulk of the burden of the casualties incident to industrial enterprise upon the shoulders of the victim of fatal mischance, vastly the weaker party to the industrial contract in the economic viewpoint, rather than upon the broader back of the employer, with whom it lay "meas-

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(3) 223 U. S. 1, supra; Michigan v. Vreeland, 33 Sup. Ct. Rep. 144, 227 U. S. 59, 57 L. ed. 417.

(4) 229 U. S. 146, 57 L. Ed. 1125.

(5) 27 Stat. at L. 531, c. 196, U. S. Comp. Stat. 1901, p. 3174; 32 Stat. at L. 943, c. 976, U. S. Comp. Stat. 1901, p. 1314; 36 Stat. at L. 298, c. 160 U. S. Comp. Stat. Supp. 1911, p. 1327; id. 1913, c. 103, U. S. Comp. Stat. Supp. 1911, p. 1333.

(6) Sanborn, J., in U. S. v. Colorado, 157 Fed. 321.

(7) L. R. 19 Q. B. Div. 653.

(8) Minn., 120 N. W. 360.

urably to control" the causes of the mischance, was in need of sharp revision. In these sentiments, the so-called Federal Safety Appliance Acts, and the kindred acts of independent state legislation had their origin. The several acts of Congress upon this subject followed one another in rapid sucession, making mandatory upon interstate carriers by railroad the observance of specific precautions in the equipment and operation of their rolling stock, instead of leaving them the liberal choice of conforming to a so-called standard of ordinary care, of which the "unbending test" was the usage of others in similar service.

The motive, no less just than benevolent, which underlay these wholesome innovations upon the common law, had, in the meanwhile, been productive of changes no less significant, and quite as far-reaching in the domestic legislation of many of the states of the Union.

The extent of these changes we shall again more particularly refer to in the course of this article.

The particular hardships of the common law, as its principles regulated the relation of master and servant, grew out of the doctrine of the assumption of risk, the related doctrine of the fellow servant, and the doctrine of contributory negligence. The effect of the joint operation of these doctrines in the absence of constitutional or statutory qualification was virtually to disable the employe injured in the course of his employment from recovering any compensation whatever for his injuries, whether arising from a normal or inherent risk of the employment, or from the negligence or default of the master.

The scope and purpose of this article does not require an extended examination of the doctrine of the fellow servant. Suffice it to say, its basis was the theory "engrafted" upon the common law by judicial interpretation, that, by his contract of service, the servant assumed responsibility for the injuries proceeding from the want of care of a fellow servant, and this fellowship in service was gradually expanded into so wide a relation as practically to connote all employes of a common master who were not in his behalf charged with some distinct non-delegable duty—who were not, as the cases put it, the employer's *alter ego.* These non-assignable duties were important as *a priori* propositions, and seem positive enough in the abstract to render the master accountable for his negligence in failing to exercise proper provision for his servant's safety. In point of fact, however, they became of comparatively little significance when brought into conflict with the doctrine of the servant's assumption of the risk; for what mattered it,.for example, that the master should exercise "ordinary care to provide a reasonably safe place" wherein the seravnt should perform his task, if the servant's knowledge of the master's omission to perform this duty were allowed to charge the servant with the consequences of the resulting peril.

The rule long ago laid down by the courts and crystallized into formula as contributory negligence, comes valiantly to the aid of the two principles already referred to, and concludes the case against the injured employe. He may not have been injured by the negligence of a fellow servant; his master's negligence is undenied. He may not have assumed the risk; the peril was unknown to him. But, he has been guilty of an inadvertence in the presence of an emergent danger, perhaps a momentary lapse of attention amid the engrossing cares of his task, and this temporary aberration convicts him at common law. Overtaken with this fault, he is denied the right of recovery on the ground of contributory negligence. The master goes scathless, and the maimed employe, henceforth a mere hulk of a man, is cast out to shift for himself.

The distinction between the liability of the servant arising from his assumption of the risk and his liability arising from his contributory negligence has not always been preserved. Nor is it easy under the authorities to take the distinction at all with any certain assurance.

When, accordingly, a statute shall abolish the one of these principles as a defense available to the master, it requires but little ingenuity where the policy of the court inclines it to take a complaisant view of the question to give effect to the other upon the same state of facts, and thus to defeat the servant's recovery.

How futile, at least how uncertain, therefore, is the efficacy of any remedial legislation which, while in terms denying the force of contributory negligence as a bar to recovery by the servant, shall, nevertheless, leave unimpaired the doctrine of assumption of the risk as a legitimate defense to the master! The significance of this remark will be apparent when we come to consider the act of April 22, 1908, as recently interpreted by the United States Supreme Court, in the case of Seaboard Air Line Railway v. Horton.[9]

Confusion also exists in the decisions as to the exact comprehension of the term "assumption of the risk." It is laid down as a general rule of law, without a dissenting voice, that the servant never assumes the risk of the master's negligence. This proposition in itself is misleading.

The true statement of the rule, paradoxical as it seems, is, according to the almost universal interpretations of the common law, that the servant never assumes the risk of the master's negligence unless such risk be assumed by him. In the theory only of the original contract of em-

sumes." The risks of which we now speak are the normal, the ordinary, the incidental hazards of the business in which he engages, without augmentation by the negligence or carelessness of the master. So far, the servant has no right to complain, for the master is not the insurer of the employe's safety. He is liable only for failure to perform some positive duty. The term "assumption of the risk," therefore, signifies no more in this aspect than that the servants elected to undertake the essential dangers of the original employment.

In its secondary sense, it is held that the phrase assumption of the risk embraces also those risks springing from the master's negligence of which the servant becomes aware, if, with the knowledge of their existence, he continues nevertheless in the employment of the master. See note to Scheurer v. Brown.[10] It is in this sense that the effect of the doctrine has come to be so generally decried, not alone by laymen, but by the liberal intellect of the bench as well. Lord Esher's caustic animadversions upon the monstrous results which flow from its application, were too obviously justified in the common observation of mankind.

Proceeding upon false and illogical principles, or rather upon no definite principle upon which the courts are agreed, like a Nessus shirt it has, nevertheless, clung to the body of the common law jurisprudence. Whether the doctrine grew out of the contract of service, or whether it is urged against the servant on the ground of an estoppel on the authority of the maxim *injuria non fit volenti,* is one of the unsolved conundrums of the law. The courts part. The embarrassment in which it involves the courts partakes of the ludicrous.

Some of the states of the Union, by constitutional ordinance, have abolished the doctrine that knowledge of the master's dereliction by the servant charges him with assumption of the risk of the attendant peril, and that the maxim ***respondeat superior,*** has no application in cases where the negligence inducing the injury was the act or omission of a fellow servant. Such is the case in Mississippi. In Virginia, the Convention of 1902 adopted, bodily, the provisions of the Mississippi law. In other states the question has been dealt with in legislative enactments, commonly known as the "Employers' Liability Acts." The statute of the state of North Carolina may be taken as an advanced type of such legislation.[11]

The question had already become one of national importance, when, harkening to a nation-wide demand, President Roosevelt, in 1907, sent his memorable message to Congress renewing his recommendation for the enactment of the Employers' Liability Act to bring the act of 1906 into harmony with the decision of the Supreme Court of the United States, in the case of Howard v. Illinois Central, etc., R. Co.[12]

It was conceived that Congress, in virtue of its powers under the commerce clause of the Constitution, could, in such a measure, enact the provisions necessary to vindicate the law against the reproach under which it had so long lain, and that the incoherent and desultory legislation of the several states could be anticipated, and assimilated in a single statute of well nigh universal application.

President Roosevelt, in 1905, in his annual message to Congress, had previously January 31, 1908. There can be no doubt of the purpose to procure a complete readjustment of the common law in the interest of the employes of railroads engaged in interstate commerce.

The conditions conducive to the enactment of the act of 1908 and the ostensible object in view cannot be set forth more clearly than they are stated in the contemporaneous utterances of those who assisted in directing the attention of Congress and of the country to the enormity of the evil which called for specific redress. In his message of 1907, President Roosevelt declared:

> "The practice of putting the entire burden of loss to life and limb upon the victim or the victim's family is a form of social injustice in which the United States stands in unenviable prominence. In both our federal and state legislation, we have, with few exceptions, scarcely gone farther than the repeal of the fellow servant principle of the old law of liability. * * * The legislation of the rest of the industrial world stands out in striking contrast to our backwardness in this respect. Since 1895, practically every country in Europe, together with Great Britain, New Zealand, Australia, British Columbia and the Cape of Good Hope, has enacted legislation embodying, in one form or another, the complete recognition of the principle which places upon the employer the entire trade risk in the various lines of industry."

The lamented Senator Dolliver, on April 22, 1908, in discussing, upon the floor of the Senate, the act of 1908, with characteristic force, expressed his views upon the matter. Said he:

> "The fact is, we have been at least a generation behind the whole world in the adoption of the doctrines and principles to which I have referred. Outside of England, there has not in modern times been

rectly, from the civil law, and, wherever the civil law crossed the water, these doctrines which we are now introducing into the United States courts in this bill have found acceptance. This is so in the courts of Quebec.

"The recent English compensation acts illustrate the present day reaction against the severity of the common law. The fact is that every country in the world has been engaged in the careful study of the relations of its working millions to its prosperity, and to its civilization, and this bill proposes to do for our workmen, seeking the protection of the courts of the United States, what the enlightened jurisprudence of all the modern nations has already done for their workmen under similar conditions.

"The public policy which we now declare is based upon the failure of the common law to meet the modern industrial conditions, and is based not alone upon the failure of these rules in the United States, but their failure in other countries as well. Mr. Asquith, present prime minister of England, said that it was 'revolting to sentiment and judgment that men who met with accidents through the necessary exigencies of daily occupation should be a charge upon their own families.'"

Can there be any doubt of the intention of Congress, in the light of this testimony? Can there, then, under the circumstances, be any serious doubt of the purpose of Congress, by the act of 1908, to abolish in all cases arising under its provisions the veto which the principles known to the common law as the doctrine of fellow servant, the doctrine of contributory negligence, and the doctrine of assumption of the risk, in its secondary or superinduced sense, impose upon the servant's action for injuries received by him in the course of the masters' service?

It is conceded that the doctrine of the fellow servant is, in fact, definitely abolished by the first section of the act. The master's liability is absolute, whether for its own or its servant's default. Contributory negligence, by the express terms of the statute, is no longer a barrier in the way of recovery where the employe's injury results in whole, or in part, from the master's default. The language of the third section makes this too plain for misconstruction.

But what of the assumption of the risk in its secondary form, the form in which it is held to save the master harmless, in spite of its negligence where the servant continues in the employment with knowledge of the master's default? Is it to be imagined that the rule of the assumed risk still survives to vitiate the act by the deliberate artifice of ambiguity, and that the whole antecedent intent of the advocates of the reform to be embodied in the act is overthrown by an equivocation, that, in Hamlet's phrase, "shall undo us?" Is the emphatic declaration of liability contained in the first section aborted, as it were, by the implication or the innuendo of the fourth section of the statute?

Is the fourth section of the act to be regarded as a joker insinuated into the act in the interest of the railroads, which the act was thought, so stringent were its terms, to hold to the obligation of an insurer.[13]

If it be true that the fourth section does preserve the doctrine of assumption of the risk of the master's negligence, where this negligence was known to the servant, as a defense to the carrier, then, verily, the statute which was proclaimed to be the Ultima Thule of remedial legislation in the employes' behalf, represents not a revolution, but a reaction; a decisive defeat, rather than a victory, for the forces making for a revision of the common law in the interest of justice and humanity.

All the toilful and painful progress which had been hitherto made in the several states by constitutional ordinance or legislative enactment toward amelioration of the barbarous rigor of the common law, has been practically set at naught, and annulled by a single sweeping act of Congress.

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(13) Minority Report, House of Representatives, R. 1386, p. 92.

According to the recent decision of the Supreme Court of the United States, in the case of Seaboard Air Line Ry. v. Horton,[14] 34 Sup. Ct. Rep. 635, precisely this result follows from the construction which the court of last resort gives to the fourth section of the act. The maladroit phraseology of the fourth section under the decision in this case renders the act not only *brutum fulmen,* but also the effective means of nullifying the liberal reforms which have been successfully accomplished by the independent action of the several states in dealing with the question of the liability of railroads to their employes.

As we have shown, many of the states of the Union long ago consigned the doctrine of assumption of the risk of the master's negligence to the limbo of things, fantastic at best, that have survived their *raison d'etre,* and, in their survival, serve only to encumber the ground. The value and importance of the agency of the states in this reform has not been without due recognition by the Supreme Court of the United States itself. In the Mondou Case, Mr. Justice Van Devanter, in delivering the opinion of the court, took occasion to say:

> "We are not unmindful that that end was being measurably attained (prevention of negligent acts and omissions by the railroads in the interest of safety of employes and the advancement of commerce) through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all states upon carriers by railroads engaged in interstate commerce, would better subserve the needs of that commerce."

We are, accordingly, by the decision in the Horton Case, brought face to face with a remarkable anomaly: we find in the act the obsolete and unjust restraints of the common law, the same persistent and indomitable principle which has been one of the chief features of its hardship; and learn that section four of the act, instead of enhancing the liability of the master as it existed at common law by restricting his choice of agencies, really operates to restrict his liability, as declared by the first section of the act, by preserving to him the all-sufficient defense of the servant's assumption of the risk, except in cases arising from the violation by the master of a "statute enacted for the safety of employes."

If the Horton Case shall stand as a final interpretation of the act of 1908, far better it were for the nation that the bill had been burked, and never reported out of committee, with its specious, but illusive, prospect of relief; that it had been left to the several states to complete the effort so auspiciously begun by them, and, unfettered by the good offices of Congress, to work out their own ultimate salvation.

In the Horton Case, it is held that section four, of the act of Congress, upon the principle *expressio unius alterius est exclusio,* infers that the doctrine of the assumed risk, may still be vouched as a defense to an action brought under its provisions to recover damages for injuries resulting from the master's negligence.[15]

A reasonable construction of this provision would seem to conduct one inevitably to the opposite conclusion. To the unsophisticated mind, the evident intendment of this section—with due regard to the maxim *ut res valeat magis quam pereat,* no less cogent than the former precept of the law in this instance—would seem to have been only to make manda-

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(15) "It seems to us that §4, in eliminat-

tory upon the master the absolute observance of the specific requirements of the Safety Appliance Acts, and to deprive him of the right which he might exercise at common law, simply to use ordinary care to provide reasonably safe appliances, etc. In the absence of the express provision of section 4, of the act of 1908, and of the specific provisions of section 8, of the Safety Appliance Act itself (27 Stat. at L. 591, chap. 196), it might have been plausibly contended that, although a violation by the master of a "statute enacted for the safety of employes," would, of course, subject the master to the penalty denounced against his delinquency by such a statute, yet the nonobservance by him of the requirements of such statute would in no case *ipso facto,* or necessarily, infer his liability to the servant for injury consequent upon the master's default in the particular in question.[16]

The considerations by which this question is to be determined are stated in 26 Cyc. 1180, as follows:

> "There is some conflict of authority as to whether a master may avail himself of the defense of assumption of risk where the injury complained of resulted from the neglect of a duty imposed by statute. Where the defense is forbidden by the statute itself, he cannot, of course, rely upon it; and where there is no such inhibition, the weight of authority seems to be to the same effect, although there are decisions which maintain a contrary doctrine. If the object of the statute is other than the protection of the servant, the master's neglect of the duty imposed will not prevent his relying on the servant's assumption of risk."

The master might still in every case of delinquency on his part have recourse to a defense predicated upon the exercise of ordinary care. He might still, for example, if he had not installed the particular appliances required by the statute, show that he had, nevertheless, in lieu of them, made use of such other appliances as were equally to the purpose, and as, at all events, were in reasonable conformity to the standard of ordinary care, of which, according to some of the authorities, "the unbending test" is the usage and custom of other employers in similar situations.

The conclusion of the court in the Horton Case is not founded upon any express provision of the act. By its first section, the liability of the carrier to the employe is in terms declared absolute in all cases of negligence or default resulting in personal injury to the servant. It abolishes, as the court emphatically holds,[17] the doctrine of the fellow servant, and yet, in the light of this untoward decision, curiously enough, revives the doctrine of the assumption of the risk, although both the doctrine of the assumption of the risk and the doctrine of the fellow servant, according to some of the authorites, stand on a footing, and depend, the one upon the servant's implied engagement to abide the chance of his fellow servant's carelessness, and the other upon his implied engagement to undertake the burden of his master's negligence, if he continues in the employment with knowledge of his master's fault.

The result reached by the court, it derives as an implication based, we believe, upon a misconception of an act which is *in pari materia,* so to speak, with other legislation by Congress embraced in the Safety Appliance Act and its congeners of the statute book. The basis of the decision is a mistaken application of the maxim *expressio unius, etc.,* in an interpretation which confounds the phrase, "risks of his employment," with the phrase, "assumption of the risk," in the sense in which it is commonly accepted. The latter phrase, where makes use of. The intention of the words "risks of his employment" does not comprehend these abnormal and extraordinary dangers, but rather the usual or normal dangers to which the servant's employment is intrinsically subject. In the context of section 4, of the act, they serve, it would seem, only to deprive the master of the plea of ordinary care in any instance of the violation by him of a "statute enacted for the safety of employes," upon the theory, for example, that the appliance in question, although other than the specific appliance required by a federal "statute enacted for the safety of employes," was, nevertheless, reasonably safe and efficient, and that, consequently, the element of danger attending its use was, upon common law principles, no more than a normal and ordinary hazard of the business; that is to say, an original "risk of the employment."

We are confirmed in this construction of the act by another consideration extraneous to the act itself. It is difficult to see how or whence the doctrine of assumption of the risk can be imported into the statute.

If, as we have already seen, the act cannot be pieced out or supplemented by the legislation of the state, it constitutes a unity within itself, creating arbitrarily by the legislative *fiat,* a right of action where none before existed under the Federal Constitution.

Moreover, there is no common law of the United States. Gattin v. Chicago.[18]

The common law is not recognized by the Federal Constitution, nor has it been adopted by any act of Congress, were Congress empowered in the absence of express constitutional warrant to adopt it as the law of the United States.

The proposal in the beginning that the

inal common law jurisdiction, was bitterly resented, and passionately resisted.[19] The common law of England is the law of the states in which it prevails only by reason of some express legislative act or constitutional sanction. The federal courts assuming to enforce it within their jurisdiction administer it not as the common law of the United States existing independently of the authority of the several states, but as the law of the states by which it has been expressly adopted. That the courts of the United States, in the application of its principles, assert the right to give these principles as a body of general law an interpretation consonant with their own proper precedents rather than with the precedents of the several states themselves, in no wise derogates from the force of this proposition, or in any respect alters the case.

Considering the circumstances, as we have unfolded them, attending the origin of the act of 1908, it is incredible that Congress in this measure while expressly abolishing contributory negligence as a bar to recovery, should have deliberately preserved the assumption of the risk of the master's negligence as a defense to the servant's action for injuries resulting, in whole or in part, from the master's default. It is more difficult to understand how, if such were the fact, the terms of the act will bear such construction; and still more difficult it is to perceive by what authority the most absurd dogma of the common law can be translated into a statute of the United States, whose courts have no concern with the common law, except as an emanation from the several states themselves in more or less qualified form. Yet, until the Horton Case is overruled, or the act itself amended, the assumption of the risk will prove to be an important, and, perhaps, a decisive factor in every case arising under its provi the risk and contributory negligence, hazy and obscure, at best, is too subtle, too nearly counterfeit, to permit us to hope that the two principles can in practice be discriminated. In the sequel, the carrier, dislodged from its entrenchment behind the doctrine of contributory negligence, in good order and with colors flying, will have only to fall back to a position more formidable still within its secondary line of defense behind the doctrine of assumption of the risk;

"For noise never frightens a soldier."

The decision of the Supreme Court in the Horton Case is, we think, based upon a partial and ill-considered view of the act. It is, nevertheless, the law until the court itself shall recall the judgment which it has delivered. Except as the act of 1908 bearing the construction which the court has given to it in this case, shall exert its paralyzing influence upon the initiative of the states in their effort to redress the injustice of the common law, the act by this decision is rendered nugatory. Tested by this decision, it is merely "a sounding brass and tinkling cymbal," the mockery of whose delusive promise of relief must needs prove a bitter disappointment to those who had confidently looked to the act as the augury of a new era in the industrial situation. To the thousands of humble toilers whose welfare it touches so nearly, it has become as poor a boon as was the feast of Barmecide to Shacabac, the beggar.

Until the decision in the Horton Case was announced, on April 27, 1914, the act of 1908 might have been regarded as a finished piece of constructive statesmanship, harmonious in all its parts and in keeping with the correlated statutes of the United States dealing with the liability of interstate carriers to their employes. Section 4, of the act, might reasonably have been taken to constitute the tie unifying the provisions of the act and bringing it into logical relation with the other acts of Congress enacted for the safety of employes. By giving effect to section 4, of the act, however, not as a part of a general scheme of legislation, but rather as the phraseology of some isolated enactment, the court has rendered the act incongruous in all its provisions and impossible of reconcilement with the kindred acts of Congress. In spite of the assurance of Mr. Justice Lurton, in the Vreeland Case,[20] that it is not to be "pieced out" by the legislation of the states, it is, nevertheless, become like the false king in the play, a thing of "shreds and patches," to be aided and supplemented by the common law of England, a body of jurisprudence which has no existence as the law of the United States, which can exist in the several states themselves, only in virtue of some legislative enactment or constitutional ordinance expressly adopting it as the law of the state, and which, in more than one of the states of the Union, has been duly repealed, so far as the assumption by the servant of the risk of the master's negligence is concerned.

The fourth section of the act in question is as follows:

> "That, in any action brought against any common carrier, under or by virtue of any of the provisions of this act, to recover damages for injuries to, or the death of, anv of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

In the apparently inoffensive language of this clause, according to the decision of the court in the Horton Case, lurks the joker in the act, a patient, though freakish, sprite, disowned by the common sense of mankind, but whom, nevertheless, the courts have long ago received into their protection, and cherished with true paternal pride as the most loyal of their

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(20) 33 Sup. Ct. Rep. 194, 227 U. S. 59, 57 L. ed. 417.

servitors, the familiar and irrepressible doctrine of assumption of the risk.*

MARSHALL R. PETERSON.

Lawrenceville, Va.

Note*—In Southern R. Co. v. Crocker, (decided June 22, 1914) 34 Sup. Ct. Rep. 897, the Supreme Court of the United States refers with approval, although without discussion, to S. A. L. Ry. v. Horton, which is the subject of review in the foregoing article.

It is the author's hope that the crucial question of the relation of the doctrine of assumption of the risk to the act of April 22, 1908, will in some future adjudication by that tribunal receive a more thorough consideration than is accorded by the opinion in the Horton case.—The Author.

WILLS—FORFEITURE OF BEQUEST.

In re KIRKHOLDER'S ESTATE.

Surrogate's Court, Erie County.

149 N. Y. Supp. 87.

While the courts are indulgent and generous in interpreting a clause in a will forfeiting a bequest in case of a contest by the legatee, the attempt of a legatee of full age to prove a false and spurious document, purporting to be a will subsequent to the testator's true will, was equivalent to a "contest" within a provision of the true will that if any person should controvert or call in question the validity of the will, the interest, legacy, or bequest of such person should pass under the residuary clause, and hence the legatee was entitled to no portion of the estate.

HART, S. The petitioner, Florine A. Kirkholder, has made application for the payment of a legacy contained in the will of William H. Kirkholder, executed on the 17th day of May, 1907. The claim is resisted by the executors, who rely upon the validity of clause ninth of the instrument:

"Ninth. I further will and direct that if any person named in this will shall in any manner controvert, dispute or call in question the validity of this will, then and in such case the interest, legacy or bequest of such person so disputing this will or calling in question the validity thereof, shall be added to and pass as a part of and under the residuary clause of this will to such person or persons as shall be entitled thereunder and thereto."

May 23, 1907, wherein the present legatee was the petitioner for probate and the active instigator of a plan and scheme to secure the entire estate for herself. The memoranda and findings of fact wherein probate was denied are contained in the record on appeal, all of which I am compelled to consider in review on this application.

The testator, at the time of the execution of his will, considered the natural objects of his bounty and made provision for this petitioner, to whom he had been married, and separated for more than 10 years, and, despite the estrangement, bequeathed to her $5,000. The restrictive forfeiture clause, above quoted, is broad in its terms, and would indicate that the testator had exercised extraordinary care and solicitude in extending its scope to embrace every possible contingency.

The general statement that "the law relating to conditions in wills imposing forfeiture of benefits thereunder on those contesting the will is in a state of confusion in England and America" (Reed on Wills, § 15), is confirmed on examining the decisions of New York and other states. In certain cases the courts have held such provisions not effective to defeat the gift to one contesting the will because there was no gift over to any one else on the violation of the provision, which is therefore to be treated as merely in terrorem. The provision has been held invalid as to realty, and a contest made by a special guardian has not prevented the infant from receiving a bequest, the minor not being held responsible for the act. The forfeiture clause has been held invalid when it clearly appears that the contest was justifiable, and not the mere vexatious act of a disappointed beneficiary. The validity of the forfeiture clause is held valid in the state of Ohio. Bradford v. Bradford, 19 Ohio 546, 2 Am. Rep. 419. The following doctrine is enunciated in 2 Williams on Executors, p. 1147:

"When there is a devise over, in case of a violation of the provision, to some person named, or that the share thus limited shall fall into the residuary estate for distribution, the share will pass to the intended devisee or to the estate upon the breach of the conditions."

The legatees under the will of Barandon, 41 Misc. Rep. 380, 84 N. Y. Supp. 937, were active contestants, and elected to forfeit any claim under the will. and the court held:

The United States Supreme Court in Smithsonian Institution v. Meech, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793, upholds the validity of a conditional bequest. Justice Brewer, in his opinion at page 415 of 169 U. S., at page 402 of 18 Sup. Ct. (42 L. Ed. 793), says:

> "The propositions thus laid down fully commend themselves to our approval. They are good law and good morals. Experience has shown that often after the death of a testator unexpected difficulties arise, technical rules of law are found to have been trespassed upon, contests are commenced wherein not infrequently are brought to light matters of private life that ought never to have been made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial, and as a result the manifest intention of the testator is thwarted. It is not strange, in view of this, that testators have desired to secure compliance with their dispositions of property and have sought to incorporate provisions which should operate most powerfully to accomplish that result. And when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall, without compliance with that condition, receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes."

The petition for probate of the actual and bona fide will of the testator was filed in this office on the 11th day of July, 1907, a citation was regularly issued, returnable July 27th, and duly served on the petitioner in this proceeding on July 16th. She thereupon, and on July 17, 1907, filed a petition for the probate of the alleged will of May 23, 1907, and a citation was issued, returnable on the 16th day of September. Objections and answers having been filed, the parties appeared in court on the 29th day of November, 1907, and a motion was made for a consolidation of the proceedings by the executor's attorney, which was denied for the purposes of reserving to the widow any technical rights that might subsequently be raised, assuming that the offer to probate the subsequent instrument was in good faith. The evidence received on the trial was of such extraordinary and startling character that probate she was of full age; the offer and attempt to prove a false and spurious document in the place and stead of the last will of the testator is equivalent to a contest and a breach of the conditions of the legacy. She has already caused the estate an expense equal to, if not exceeding, the amount of her original bequest, and I am unable to find under any rule of law or equity that she is entitled to participate in any share or portion of this estate.

Decree may enter accordingly.

NOTE.—*Forfeiture of Devise or Legacy by Contest of a Will.*—It generally has been held that there is nothing contrary to public policy for a testator to forfeit a bequest or devise upon the legatee or devisee contesting the validity of a will containing it. But there has been much dispute and variant ruling as to what amounts to a contest under forfeiture clauses in a will. Its operation is generally upheld when there is a gift over upon breach. Cleaner v. Spurling, 2 P. Wms. 528; Re Bratt, 65 N. Y. S. R. 247, 32 N. Y. Supp. 168; Smithsonian Institution v. Meech, 169 U. S. 398, 42 L. ed. 793. And there is ordinarily held to be exception to operation where there is no gift over. White's Estate, 163 Pa. 388, 30 Atl. 192. And where there was *probabilis causa litigandi*, that is to say, the existence of reasonable grounds for contesting a will. Powell v. Morgan, 2 Vern. 90; Morris v. Burroughs, 1 Ark. 399; Chero's Appeal, 45 Pa. 228 (dictum); Jackson v. Westerfield, 61 How. Pr. 399; Re Friend, 209 Pa. 442, 58 Atl. 853, 68 L. R. A. 447.

In the Friend case it was said: "Such conditions to testamentary gifts and devises are universally recognized as valid, and by some courts, enforceable without exception. The better rule, however, seems to us to be that the penalty of forfeiture of the gift or devise ought not to be imposed when it clearly appears that the contest to have the will set aside was justified under the circumstances and was not the mere vexatious act of a disappointed child or next of kin. A different rule—an unbending one—that in no case shall an unsuccessful contestant of a will escape the penalty of forfeiture of the interest given him, would sometimes not only work manifest injustice, but accomplish results that no rational testator would ever contemplate."

The court goes on to illustrate in the case of undue influence, saying if it is sufficient to cause the execution of a will, it is also sufficient to cause it to state as a condition of forfeiture that it shall not be contested. "He who will not believe any can be found, sustaining the proposition that a devisee or legatee shall not have the right, upon probable cause, to show that a will is a forgery, without incurring the penalty of forfeiting the estate given to him by the will. The right of a contestant to institute judicial proceedings upon probable cause, to ascertain whether the will was ever executed by the apparent testator, is founded upon justice and morality. If a devisee should accept the fruits of the crime of forgery, under the belief that it was a forgery, he would thereby become morally a *particeps criminis,* and yet, if he is unwilling to commit this moral crime, be confronted with the alternative of doing so, or of taking the risk of losing under the will, in case it should be found not to be a forgery. Public policy forbids that he should be tempted in such a manner. This is far more obnoxious to public policy than a condition in the will against marriage."

In Moran v. Moran, 144 Iowa 451, 123 N. W. 202, 30 L. R. A. (N. S.) 898, the will contained a certain devise, which was sought to be declared inoperative because testator was ignorant of certain antecedent facts regarding the property contained in such devise. The court said: "Upon the probate of their father's will either of three causes was open to appellants. They could yield to its terms and by accepting the legacies abandon all claims of right in hostility to the will, or they could by proper action in court seek to have the will declared invalid in its entirety, upon allegation of proper grounds therefor, or without asserting the invalidity of the instrument as a will, they could bring action to defeat its provisions by claiming ownership in themselves of the property of the estate independent of the will. They chose the latter course, denying the testator's title to the land, and impeaching the validity of the devise thereof by the will, and this election, we think, was a breach of the condition which the testator annexed to his gifts."

This ruling was dissented from by the Chief Justice on the general ground that conditions of this kind are *in terrorem,* and on the further ground that there must be an actual contest of the will.

In Kayheart v. Whitehead, 77 N. J. Eq. 12, 76 Atl. 241, the filing of a caveat was held to come under a clause to retain from the legacy of a beneficiary the cost of any proceeding against a will.

Re Miller, 156 Cal. 119, 103 Pac. 842, 23 L. R. A. (N. S.) 868, is opposed squarely to the Friend case, *supra,* appellant therein, former contestant, proceeding upon the ground of undue influence, as to which the trial court found there was probable cause. The court denied that this would pre-

clearly that there was good ground to believe there was undue influence or forgery. While one has a right to devise his property as he pleases, yet conditions merely *in terrorem* ought not to be enforced. C.

CORRESPONDENCE.

NOTICE OF MEETING OF THE SOUTH DAKOTA BAR ASSOCIATION.

Editor Central Law Journal:

In reply to your inquiry of the 12th instant with reference to the program for the coming meeting of the South Dakota Bar Association to be held at Pierre, South Dakota, on January 13 and 14, I have to advise you that the program is not completed, but so far as arranged will be as follows:

The president's address by the president of the association, Dick Haney, of Mitchell, South Dakota.

A paper on "The Classification of Municipal Corporations," by Judge John Howard Gates, of the supreme court of the state, of Sioux Falls.

"Banking Legislation," by P. C. Morrison, of Mobridge, South Dakota.

"The Responsibility of the Press for Prevention of Impartial Trials in Criminal Cases," by Howard G. Fuller, of Pierre.

When the announcement of the meeting, which will contain the complete program is sent out, which will probably be in about a week or ten days, I will send a copy of it to you.

You might add as an item of interest to lawyers that the meeting of the association will be followed on January 15 at Pierre by the annual meeting of the States Attorneys' Association of South Dakota. A former attorney general of the state five or six years ago conceived the plan of having the states attorneys meet for a conference on the day following the meeting of the State Bar Association and at the same place. The plan has worked very successfully. The meeting of the states attorneys has resulted, among other things, in in-

NOTICE OF MEETING OF THE MAINE BAR ASSOCIATION.

Editor Central Law Journal:

The annual meeting of the association will be held at the State House, in Augusta, on the 13th day of January, 1915, for the usual purposes of an annual meeting—report of committees, etc., etc. Hon. Frank N. Parsons, Chief Justice of New Hampshire, has consented to deliver an address on the afternoon of that day in the Senate Chamber, and to be the guest of the association at its annual banquet in the evening at the Augusta House. It is expected that practically all of the justices of our Supreme Judicial Court will be present, Hon. A. R. Savage, our chief justice, having been a classmate of Mr Justice Parsons at Dartmouth College. The president of the association will give a short address in the afternoon and other minor exercises will take place. The event of the occasion will be the address of Mr. Parsons.

Very truly yours,
GEORGE C. WING,
President Maine Bar Ass'n.

NOTICE OF MEETING OF THE NEW YORK STATE BAR ASSOCIATION.

Editor Central Law Journal:

The meeting of the New York Bar Association will be held in Buffalo on January 22 and 23. Hon. William H. Taft will deliver the annual address, but his subject has not yet been fixed. Carlos C. Alden, dean of the Buffalo Law School, will furnish a paper on the subject "The Unification of the Laws of the Different States." Professor Morris R. Cohen, professor of philosophy of the College of the City of New York, will read a paper on "Legal Theories and Social Science." Hon. Morgan J. O'Brien, of New York City, will read a paper on "The Making of Constitutions."

The principal topic for discussion at the meeting in view of the fact that our Constitutional Convention will convene on April 15, 1915, will be "Should the Executive and Judiciary Articles of the Constitution be Revised and if so, How?"

I have not yet received the subject of the address which will be delivered by President Alton B. Parker. As soon as I do receive it, I shall forward it to you. In addition to the above papers, there will be the usual reports of our various committees.

Very truly yours,
FREDERICK E. WADHAMS, Secretary.

HUMOR OF THE LAW.

BUSINESS UNDER DIFFICULTIES.

Is business over-regulated? It's harassments long ago set wits to moving, and now humor sallies forth to its rescue. The following form has been devised by a sophisticated business man:

Business Letter Writer for 1915.

To——————————

Gentlemen:

Referring to your letter (see Postal Regulation, p. 126, 11, 44) of the 28th, we a corporation organized under the laws of Indiana, certificate filed in the office of the Secretary of State of Indiana, Indianapolis, beg to advise you that we can quote the price of $20 (see United States revised statutes, laws of 1914, sec. 18) per ton, carload lots (see interstate commerce rulihg 256, see also dicta of 128 U. S. 264; Brown v. Pennsylvania Railroad Company, 168 Pa. 267). This quotation is special to you (see ruling of department of justice in the matter of Brown Milling Co.) and is made subject to our right to claim immunity (see N. Y. Penal Code, pp. 48). If you receive a better quotation from any other of our competitors you will of course, advise us under the authority of the U. S. Revised Statutes, pp. 2247, sub. 2. We shall be glad to fill your order (subject to rule laid down in leading case of Jackson v. Cobb, 126 U. S. 232) and will ship according to your instructions (see rule 37, New York Public Utility Commission).

Yours very truly,
JOHN DOE,
President Doe Manufacturing Co.

State of Indiana, County of St. Joseph, ss:

John Doe, being duly sworn, deposes and says: That he has submitted the foregoing letter to his counsel, and has been advised that it is legal. That deponent is not a director of any bank, trust company, or transportation company. That the Doe Manufacturing Co. has never had its charter forfeited, nor has deponent ever been indicted by either State or Federal grand jury.

P. P. WHITE,
Notary Public.

The foregoing is recommended to all of the Washington authorities. A little nonsense now and then should be relished by the president and congress and even the supreme court.—St. Louis Post-Dispatch.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Abandonment**—Quieting Title.—Where respondent, after his mother had entered upon land under a contract to purchase, acquired a tax deed thereto, the mother's statement that she relinquished the property to him did not constitute an abandonment, and the son, tracing title from his mother, could not claim it, after judgment had been recovered against her quieting title in the vendor.—Dresser v. Allen, Cal., 142 Pac. 911.

2. **Attorney and Client**—Contingent Fee. — Under a contract between attorneys and an executor, held, that the attorneys were entitled to receive for successful services such compensation as should be reasonable, in view not only of the circumstances generally but of the fact that the fee was contingent.—In re Kings County Trust Co., 149 N. Y. Supp. 124.

3.——Services.—Where a stockholder was contractually bound to pay the reasonable value of attorney's services, performed partly for his individual benefit and partly for the benefit of the corporation, and the court allowed a certain sum as compensation for services performed for the corporation, held that the stockholder, as an individual, was released from liability for such sum, plus the amount in excess thereof, of the contract price, which was fairly referable to the corporation, and was liable only for such portion of the whole contract fee as was fairly referable to services not for the corporation's benefit.—Colley v. Sapp, Okla., 142 Pac. 989.

4. **Bankruptcy**—Exemption. — A bankrupt owning property used for hotel purposes, on which he and his family resided as a homestead, held entitled to have $2,000 of the value thereof exempt to him as homestead, under Rem. & Bal. Code, Wash., § 552.—In re Robison, U. S. D. C., 215 Fed. 662.

5.——Liens.—Under Bankruptcy Act, giving to the trustee the rights of the lien creditor, such trustee could disregard a chattel mortgage invalid as against lien creditors of the mortgagee for failure to file affidavits required to keep the mortgage alive, though there was no creditor of the bankrupt holding a lien on the chattels.—In re Pittsburg-Big Muddy Coal Co., U. S. C. C. A., 215 Fed. 703.

6.——Novation.—Where a claimant sold certain goods to the bankrupt, he did not become a creditor of the bankrupt so as to object to an order for a sale of the property free from liens.—In re Pittsburg-Big Muddy Coal Co., U. S. C. C. A., 215 Fed. 703.

7.——Preferred Debt.—Where the claim of a city and town against a bankrupt for unpaid taxes is supported by sworn valuations neither unjust nor illegal, the claim must be allowed as preferred, without reference to the hardship worked on general creditors.—In re Bushnell, U. S. D. C., 215 Fed. 651.

8.——Preference.—A payment held not a preference, where it did not appear that transferees did not have reasonable cause to believe that the bankrupt was insolvent.—First Nat. Bank of Cleveland v. Orten, Okla., 142 Pac. 1096.

9.——Provable Debt.—Under Bankruptcy Act, § 57j, obligation on forfeited bail bond held not provable in bankruptcy and not discharged by the bankrupt's discharge, and the bankrupt was not entitled to a discharge of record of a judgment on such bond under Debtor and Creditor Law, § 150.—In re Weber, N. Y., 106 N. E. 58.

10.——Rescission.—Where certain goods were sold to the bankrupt on open account, the title vested at once, and the relation of debtor and creditor was created, so that on bankruptcy intervening the seller was not entitled to rescind and reclaim.—In re Caldwell Machinery Co., U. S. D. C., 215 Fed. 428.

11.——Solvency.—In determining the solvency of an alleged bankrupt, liability as surety or indorser for a solvent principal is not to be counted as a liability.—In re Bowers, U. S. D. C., 215 Fed. 617.

12.——Unpaid Subscription.—The liability of a stockholder for an unpaid subscription or an equivalent liability is an asset of the corporation.—Babbitt v. Read, U. S. D. C., 215 Fed. 395.

13. **Banks and Banking**—Check.—A bank's payment of a check to a person other than the payee to whose order it is drawn is ordinarily at its own peril, unless it can claim protection, under the common-law rule incorporated in the Negotiable Instrument Law, § 30, on some principle of estoppel or negligence chargeable to the depositor.—Grand Lodge of Kansas, A. O. U. W. v. State Bank, Kan., 142 Pac. 974.

14.——Recharging.—Where plaintiff had a deposit account with defendant, to which checks deposited in the ordinary course of business were credited as cash and against which he was entitled to draw at once, a check so deposited became the property of the bank, which was not entitled to recharge the same on its subsequently becoming lost in the mail in process of collection.—Spooner v. Bank of Donalsonville, Ga., 82 S. E. 625.

15.——Stock Liability.—Under Const. art. 11, an assignor of bank stock remains liable for an indebtedness incurred by the bank while he was owner.—Dunn v. Bank of Union, W. Va., 82 S. E. 758.

16. **Bills and Notes**—Bearer.—Where the maker of a note drew it to its own order, and then indorsed it in blank, it was, in legal effect, a note payable to bearer, and no written indorsement was necessary to pass title.—Williamson Bank & Trust Co. v. Miles, Ark., 169 S. W. 368.

17.——Indorsee.—An indorsee of a note as collateral security, without notice of any infirmity in the indorser's title, is an indorsee in due course and a bona fide holder for value.—Citizens' Trust & Savings Bank v. Empey, S. D., 148 N. W. 606.

18.——Notice.—Negotiable Instruments Act, specifying what shall constitute notice of infirmity in an instrument, or defect in the title of a person negotiating the same, applies to corporations as well as natural persons.—Cox & Sons Co. v. Northhampton Brewing Co., Pa., 91 Atl. 859.

19.——Transferee.—Where the transferee of a note is unable to sue in his own name, his rights may be enforced by an action in the name of his assignor suing for his use.—Toole conversion.—Georgia, F. & A. Ry. Co. v. Blish Milling Co., Ga., 82 S. E. 784.

21.——Bill of Lading.—Where a bill of lading is indorsed to the bank with draft attached and the draft paid to the assignor by the bank, it transferred the legal title of the property called for in the bill of lading.—State Nat. Bank of Oklahoma City v. Wood, Okla., 142 Pac. 1002.

22. **Carriers of Live Stock**—Damages.—In an action for damages to a shipment of live stock, some of which died, the measure of damages is the value of the stock at the time at which it should have been delivered, which value, if there is a market at the place of destination, will be measured by the market value, and, if not, by the inrtinsic value.—International & G. N. Ry. Co. v. Parke, Tex., 169 S. W. 397.

23. **Carriers of Passengers**—Mixed Train.—A passenger on a mixed train assumes the risks reasonably incident to travel thereon, though the carrier assumes as to him the same high degree of care to protect him from injury as if he were on a passenger train subject to the necessary difference in their operation.—St. Louis South Western Ry. Co. v. Overton, Ark., 169 S. W. 364.

24. **Commerce**—Section Hand. — A section hand, injured while engaged in preparing the track of defendant railway for use in interstate commerce, is within the federal Employers' Liability Act.—Truesdell v. Chesapeake & O. Ry. Co., Ky., 169 S. W. 471.

25.——State Regulation.—A state regulation, which required a railroad company to stop through trains engaged in interstate commerce at a particular point, was not invalid as an interference with interstate commerce, where the railroad company, as a public carrier, owed the inhabitants of that locality the duty of stopping its trains there.—Gulf, C. & S. F. Ry. Co. v. State, Tex., 169 S. W. 385.

26.——White Slave Act.—Congress, under the commerce clause of the Constitution, had full power to pass the White Slave Act, though it be cosstrued as extending to the transportation of a female from one state to another solely for the purpose of unlawful sexual intercourse with the defendant.—Johnson v. United States, U. S. C. C. A., 215 Fed. 679.

27. **Constitutional Law**—Corporations.—The denial of an application for the incorporation of a social and literary club, pursuant to Civ. Code, 1910, §§ 2823, 2836, is not reviewable by the Supreme Court; the power of the court in granting a charter being legislative.—In re Union Club, Ga., 82 S. E. 643.

28. **Contracts**—Construction.—In a contract providing that one party thereto should "give" the other, a certain formula and receive therefor "a reasonable amount from the profits" derived from the sale of articles manufactured therefrom, the word "reasonable" was synonymous with "satisfactory," and rendered the contract too indefinite to be enforceable.—Cauet v. Smith, 149 N. Y. Supp. 101.

29.——Direction of Verdict.—In an action for breach of contract, where the breach is proved and there is exact and uncontradicted proof as to the amount and date of the losses sustained by plaintiff, it is not error to direct a verdict both for damages and interest.—Princess Furnace Co. v. Virginia-Carolina Chemical Co., U. S. C. C. A., 215 Fed. 329.

30. **Corporations**—Cessation. — Where a private corporation is unable to do business except at a loss, it has the right to cease doing business.—Levin v. Mayer, 149 N. Y. Supp. 112.

31.——Franchise.—A corporation, which purchased all the property and franchises of another at a dissolution sale, acquired the right to so use the name of the corporation, whose business and good will it had purchased, as to indicate that it was its sucessor.—R. J. Horner & Co. v. Lawrence, 149 N. Y. Supp. 82.

32.——Merger.—A transaction by which one corporation exchanged its own stock for all of the stock of others, and took transfers of all of their property and choses in action, held in effect a merger, and not a change of ownership of the property, and to entitle it, on discovery that contracts by which they had acquired property were voidable for fraud, to exercise their right to elect to rescind.—American Ship Building Co. v. Commonwealth S. S. Co., U. S. C. C. A., 215 Fed. 304.

33.——Partners.—The organizers of a corporation are not liable as partners on contracts made by a corporation before filing of the affidavit required by Gen. St. 1909, § 1709, as to payments on capital stock.—Murdock v. Lamb, Kan., 142 Pac. 961.

34.——Sale of Business.—Directors of an insolvent corporation without assets to continue its business under a resolution passed by a majority of the stock, held authorized to sell the corporation's business and assets as against a minority stockholder, who, in the absence of fraud or bad faith, was not entitled to compel a valuation and purchase of his stock under Stock Corporation Law, §§ 16, 17.—Weingreen v. Michelbacher, 149 N. Y. Supp. 110.

35.——Sole Ownership.—A pledgee of the entire stock of a corporation is entitled, immediately upon the giving of a mortgage upon the property of the corporation, to sue to annul such mortgage; the mortgage depreciating the value of his security.—Kneeland Inv. Co. v. Berendes, Wash., 142 Pac. 869.

36.——Treasury Stock.—A purchaser, who acquires treasury stock of a corporation after it has been organized, is not liable for the par value of the stock, where it was sold in good faith for an amount less than par.—Witt v. Nelson, Tex., 169 S. W. 381.

37.——Trust Fund.—When a corporation becomes insolvent, it is so far civilly dead that its property may be administered in equity as a trust fund for the benefit of its stockholders and creditors, of whatever state they may be residents.—Holt v. State Roads Commission, Md., 91 Atl. 874.

38. **Covenants**—Restrictions. — Restrictions under a general plan adopted by the owner to sell lots may in equity be imposed on the lands beyond the express restrictions contained in the deeds to the purchaser, on the theory of implied covenants.—Schickhaus v. Sanford, N. J., 91 Atl. 878.

39. **Courts**—Diverse Citizenship.—A stipulation at the opening of a trial that plaintiff was a "resident" of a state other than that of which defendants were citizens was insufficient to show jurisdiction in a federal court upon diverse citizenship.—Hogg v. Maxwell, U. S. C. C. A., 215 Fed. 360.

40.——Jurisdiction.—The jurisdiction of a federal court being a limited one, it cannot be extended by uniting a cause of action of which it has no jurisdiction with one within its jurisdiction.—Electric Boat Co. v. Lake Torpedo Boat Co., U. S. D. C., 215 Fed. 377.

41.——Law of the Case.—The decision of the court of appeals in any case is the law, not only of that case, but of all other cases subsequently arising in the inferior courts of that state, involving substantially a like question of fact, whether its decision declares the law in conformity to the view held by the judge of the inferior court or not.—Rist v. Commonwealth, Ky., 169 S. W. 475.

42. **Criminal Evidence**—Negative Testimony.—Where defendant's evidence tended to show that deceased was shot by C in a quarrel over a ring which deceased stated he had given to a certain girl, and which he accused C of having in his possession, it was error to permit the girl to testify that she did not know C, had never given him a diamond ring, never had a diamond ring, and that deceased never gave her any jewelry.—People v. Jung Hing, N. Y., 106 N. E. 105.

43. **Criminal Law**—Accomplice.—The thief is not an accomplice of the accused, and it is not essential in a prosecution for receiving stolen goods that the thief's testimony be corroborated.—Mayes v. State, Okla., 142 Pac. 1049.

44.——Accomplice. — Where accused was charged as an accomplice to the commission of an abortion in P county, venue was properly laid there, though the acts charged against accused were committed in another county.—Fondren v. State, Tex., 169 S. W. 411.

45.——Admissions.—Admissions by accused to a police officer at the time of his arrest held inadmissible without laying a foundation if not confessions.—People v. Svendsen, Cal., 142 Pac. 861.

46.——Arrest of Judgment.—Where an information fails to state a public offense, and the question is raised by motion in arrest of judgment, the judgment should be arrested.—Feige v. State, Okla., 142 Pac. 1044.

47.——Bribery.—One charged with an offense, as bribery, the punishment of which will deprive him of his liberty, is entitled to demand that he be prosecuted under a statute clearly defining the crime.—People v. Salomon, N. Y., 106 N. E. 111.

48.——Dying Declaration.—It is error for the court to inform the jury that a dying declaration is entitled to the same weight as testimony under oath subject to cross-examination.—State v. Scott, Nev., 142 Pac. 1053.

49.——Evidence.—In a prosecution for homicide, the exclusion of evidence as to statements by the magistrate, before whom one of the state's witnesses was examined at a time when he was accused of offense, is proper.—People v. Eng Hing, N. Y., 106 N. E. 96.

50.——Intoxicating Liquors.—A copy of a United States government license, taken from the books of the collector of internal revenue and certified by him, is competent evidence in a prosecution for having intoxicating liquors for the purpose of sale in local option territory, without further authentication.—Gossett v. Commonwealth, Ky., 169 S. W. 478.

51.——Opinion. — Testimony that deceased "generally laid his hat aside when he sat down for a conversation, and lit his pipe to smoke; he generally laid his hat down where I saw it that night"—held properly admitted over objection that it expressed a mere opinion of the witness.—Butler v. State, Ga., 82 S. E. 654.

52.——Witnesses.—The degraded character of the witnesses for the state in a criminal prosecution will not authorize the court in taking questions of fact from the jury.—People v. Eng Hing, N. Y., 106 N. E. 96.

53. **Death**—Loss of Services.—The basis of a father's right of action, under Civ. Code 1910, § 4412, for wrongful death of his child, is loss of services of the child; and hence there can be no recovery where the child was incapable of rendering services at the time of its death.—Crenshaw v. Louisville & N. R. Co., Ga., 82 S. E. 767.

54. **Deeds**—Bodily Heirs.—Where land was conveyed to a woman and to her bodily heirs and assigns forever, she took a fee conditional, and might, at common law, upon the birth of lawful issue, convey the land in fee simple.—Crawford v. Masters, S. C., 82 S. E. 793.

55. **Descent and Distribution**—Delay.—Delay in administration is not a substantial injury to an heir, and a creditor may restrain the conveyance of real property by the heir until the orphan's court has opportunity to enforce the creditor's lien by a sale of the land to pay debts.—Incandescent Light & Stove Co. v. Stevenson, N. J., 91 Atl. 802.

56. **Divorce**—Custody of Children.—A divorce decree of a sister state awarding the custody of minor children is not res judicata in proceedings in this state as to facts and conditions arising subsequent to the foreign decree and not before the court on its rendition.—Mylius v. Cargill, N. M., 142 Pac. 918.

57. **Easements** — Prescription. — Where a passway over a mill lot to a store on a lot belonging to the same owner had been used by the public for 40 years prior, a grantee of the lot burdened with the way took title subject to the easement.—Stone v. Burkhead, Ky., 169 S. W. 489.

58.——Way of Necessity.—The rule that if one conveys land leaving other land belonging to him to which he can have access only by passing over the land granted, a way of necessity is reserved obtains though the grant is for a railroad right of way.—Heaton v. New York Cent. & H. R. R. Co., 149 N. Y. Supp. 71.

owner is entitled to recover the value of the improvements as a part of his damages in such proceedings.—Virginia & S. W. Ry. Co. v. Nickels, Va., 82 S. E. 693.

61.——Public Use.—Private property can be condemned only where it can be made to subserve some public use, and not where the purpose for which it is sought to be taken cannot be accomplished.—Minnesota Canal & Power Co. v. Fall Lake Boom Co., Minn., 148 N. W. 561.

62.——Riparian Owner.—A riparian owner in building piers or other structures to the harbor line, established by the secretary of war, takes the risk of a change in such line and the removal by the government of so much of his structures as extend beyond the new line is not a taking of his property, for which he is entitled to compensation.—Garrison v. Greenleaf Johnson Lumber Co., U. S. C. C. A., 215 Fed. 576.

63. **Equity**—Bill of Review.—A bill of review will not lie, unless the facts upon which it is based are recited in the decree sought to be reviewed, or admitted in the pleadings.—Phipps v. Wise Hotel Co., Va., 82 S. E. 681.

64.——Clean Hands.—Complainants, having induced a baseball player, under reservation with the Philadelphia Club to contract for services for 1914, to contract to serve complainants for that season without any effort to agree to serve the Philadelphia Club, held not entitled to restrain him from serving such club under a subsequent contract made with it, under the maxim that he who comes into equity must come with clean hands.—Weeghman v. Killifer, U. S. D. C., 215 Fed. 289.

65. **Estoppel**—Delay.—Where a person enters into possession of land as owner, but, by falsely stating to the equitable owner that his possession is merely that of a tenant, induces her to delay, he is estopped from asserting that the period during which she delays from such cause should be counted in computing any prescriptive period in his favor as against her.—Coates v. Jones, Ga., 82 S. E. 649.

66. **Estates**—Merger.—The doctrine of merger should not be employed to defeat testator's intention and extinguish the rights of strangers not parties to the transaction.—Bullock v. Wiltberger, Kan., 142 Pac. 950.

67. **Evidence**—Judicial Notice.—Where the evidence discloses facts from which bias of a juror is to be inferred, the court must take judicial notice that the juror will most probably act is accordance with such bias.—Temples v. Central of Georgia Ry. Co., Ga., 82 S. E. 777.

68.——Parol.—In an action on a contract to pay for a horse, a provision that "if the full amount is not subscribed, this is null and void," held not to preclude the introduction of parol evidence of a condition that plaintiff should procure financially responsible and otherwise satisfactory subscribers.—Rutherford v. Holbert, Okla., 142 Pac. 1099.

69.——Parol.—Where a note for the price of a horse indicated on its face that all the terms of the sale were not included in the writing, parol evidence was admissible to show a contemporaneous express warranty that the horse was suited for purposes for which the seller knew he was bought.—Watson v. Smith, Ga., 82 S. E. 633.

70. **Executors and Administrators**—Surviving Partner.—After determination of the interest of a deceased partner, it is payable by the surviving partner to the deceased partner's administrator.—Pierson v. Garrison, N. J., 91 Atl. 829.

71. **Exemptions**—Infants.—The right of in-

73. **False Imprisonment**—Liability. — The vice-president and manager of a corporation to which plaintiff was indebted, who united in the bond given by the corporation to procure plaintiff's arrest as an absconding debtor, is liable for plaintiff's false imprisonment.—Hayes v. Hutchinson & Shields, Wash., 142 Pac. 865.

74. **False Pretense**—Intent.—On trial for larceny by false pretenses, evidence as to false representations of a kindred nature, made by one of defendants to third persons some time before his dealings with the prosecuting witness, held properly admitted to show intent.—Commonwealth v. Farmer, Mass., 106 N. E. 150.

75. **Fraud**—Damages.—The right of a party to a contract to recover damages for false representations is not destroyed because he did not avail himself of the means of knowledge at hand; but if he did avail himself of an opportunity to test the truth of the representations, and discovered their falsity, there can be no recovery.—Gratz v. Schuler, Cal., 142 Pac. 899.

76.——Opinion.—There is a false representation of fact where one expresses an opinion as to value for the purpose of misleading, when in fact he does not entertain that opinion.—Sleeper v. Smith, N. H., 91 Atl. 866.

77. **Fraudulent Conveyances** — Burden of Proof.—Where a conveyance by husband to wife is attacked as fraudulent as to his creditors the burden is on him to establish good faith by the most satisfactory evidence.—Tucker v. Weathersbee, S. Car., 82 S. E. 638.

78.——Husband and Wife.—A judgment creditor of a husband cannot compel him to work for wages, or to charge for services he renders others, nor object to his rendering services for his wife without pay.—Pierson v. Garrison, N. J., 91 Atl. 824.

79. **Frauds, Statute of**—Parol Evidence.—An agent appointed by parol may make a binding contract for the sale of real estate.—Record v. Littlefield, Mass., 106 N. E. 142.

80.——Writing.—A contract, which does not, by its terms or by necessary implication carry its full performance beyond a year, need not be in writing.—McClanahan v. Otto-Marmet Coal & Mining Co., W. Va., 82 S. E. 752.

81. **Garnishment**—Property Subject to.—A creditor cannot, by garnishment, reach assets which the debtor himself could not recover from the garnishee.—Southern Amusement Co. v. Neal, Ga., 82 S. E. 765.

82.——Traverse.—The question whether a debt claimed to be due from defendant to garnishee is just or fraudulent may properly be raised on an issue formed on a traverse to garnishee's answer.—Smith v. Dysard Const. Co., Ga., 82 S. E. 761.

83. **Gifts**—Parol.—A person cannot by parol, and without complying with the law of gifts or of wills, make securities or other instruments for the payment of money the subject of a voluntary disposition to take effect on his death.—In re Brown, 149 N. Y. Supp. 138.

84. **Hospitals**—Liability.—A hospital conducted for private gain is liable to a patient for the negligence of nurses while acting within the scope of their employment.—Broz v. Omaha Maternity & General Hospital Ass'n, Neb., 148 N. W. 575.

85. **Homicide**—Dying Declarations. — Proof that decedent died within 12 hours after being shot, that his wounds were necessarily fatal, and that he stated that he was dying and expressed no hope of recovery, held to sufficiently show that he was conscious of impending death to authorize an admission of his statement as a dying declaration.—Hawkins v. State, Okla., 142 Pac. 1093.

86.——Self-Defense.—The law of self-defense justifies a homicide only when the killing is necessary at that particular time to prevent an actual or reasonably apparent commission of a felony.—Marshall v. State, Okla., 142 Pac. 1046.

87.——Self-Defense.—One attacked by another has the right to use his own judgment in determining what is necessary to repel the attack, and his right to kill in self-defense cannot be limited by what may appear to the jury to have been absolutely necessary.—State v. Scott, Nev., 142 Pac. 1053.

88. **Husband and Wife**—Privileged Communications.—If third persons heard conversations between husband and wife, pertinent to show whether she left him voluntarily, or was persuaded by defendant to leave him, their testimony in respect thereto is competent.—Willey v. Howell, Ky., 169 S. W. 519.

89. **Insurance**—Accident.—Death from apoplexy, resulting from excitement caused by witnessing a man being burned to death in an accidental fire, held death by accident, within the terms of an accident certificate, and not from disease.—International Travelers' Ass'n v. Branum, Tex., 169 S. W. 389.

90.——Beneficial Society.—Where a member of a beneficial society in his application for membership has agreed to be bound by the rules or laws then in force or thereafter adopted, the society may bind him by after-adopted by-laws, even though not retroactive in terms, if reasonable in character.—Arold v. Supreme Conclave, Improved Order of Heptasophs, Md., 91 Atl. 829.

91.——Change of Title.—Where a fire insurance company's local agent knew, before the issuance of a renewal policy, that the title to the property had changed, the company was bound by such knowledge, though the policy provided that agents could not waive any provisions of the policy except in writing indorsed on the policy.—Germania Fire Ins. Co. v. Barringer, Okla., 142 Pac. 1026.

92.——Default.—Where insured gave due notice of a claim for damages under a policy, and defendant assumed it, but subsequently refused to continue the defense, whereupon a default judgment was rendered against plaintiff which was paid, such judgment was by a "court of last resort," within the provision of the policy that defendant should not be liable except for a loss actually sustained in the payment of such a judgment.—Tighe v. Maryland Casualty Co., Mass., 106 N. E. 135.

93.——Extended Insurance.—Where a privilege of electing to take paid-up insuranace or extended insurance is guaranteed by the policy, and insured dies after defaulting in the payment of a loan and premiums, but before expiration of the election period, the privilege of election is property right which survives to his legal representative.—McEachern v. New York Life Ins. Co., Ga., 82 S. E. 820.

94.——Notice.—Where an agent of an insurance company insures his own property for his own benefit, it is his duty to notify the insurer of his ownership as an element of the risk.—Wood v. Spring Garden Ins. Co. of Philadelphia, Pa., U. S. C. C. A., 215 Fed. 355.

95.——Waiver.—That the insurer's agent examined the stock when the policy was written, and might have discovered that the insured did not keep a fireproof safe, and was not a waiver of insured's obligation to comply with the fireproof safe clause of the policy.—Hammond v. Niagara Fire Ins. Co., Kan., 142 Pac. 936.

96.——Waiver.—Where though the purchaser of insured property notified insurer's agent of his purchase, he did not request its consent, and it neither assented nor waived a condition that the policy should be void in case of change of title, unless otherwise provided by agreement indorsed thereon or added thereto, held that there could be no recovery.—Plockzek v. St. Paul Fire & Marine Ins. Co., N. J., 91 Atl. 812.

97. **Intoxicating Liquors**—Intent.—Since in a prosecution for selling intoxicating liquor, intent is presumed from proof of the sale, such proof is all that is required.—Montgomery v. State, Okla., 142 Pac. 1048.

98.——Sale.—Since a sale made in Georgia of intoxicating beers was in violation of Pen. Code, the purchase price could not be recovered.—Cook Brewing Co. v. Lawrence, Ga., 82 S. E. 653.

99. **Landlord and Tenant**—Cancellation.—Where, with the consent of the landlord, and at the instance of the lessee, the contract is canceled, and a new contract, signed by another party, is substituted, the relation of landlord and tenant was not established between the parties to the original contract.—Whitlock v. Wynn Co., Ga., 82 S. E. 664.

100.——Lease.—Agreements by a lessee to erect on the premises, a building "in a manner satisfactory" to the lessor, and "in a manner to the reasonable satisfaction of the lessor," required the work to be done in such a way as ought to satisfy the lessor.—Wentworth v. Manhattan Market Co., Mass., 106 N. E. 118.

101. **Libel and Slander** — Defamation. — "Libel" and "slander" are both methods of defamation; the former being expressed by print, writing, pictures, or signs; the latter by oral expressions.—Spence v. Johnson, Ga., 82 S. E. 646.

102.——Race.—To call a white person a negro is defamatory and actionable, notwithstanding the thirteenth, fourteenth and fifteenth amendments of the federal constitution.—Spencer v. Looney, Va., 82 S. E. 745.

103. **Liens**—Equitable. — Where defendant sold plaintiff logs to be delivered by him, and plaintiff advanced to defendant $2,000 after having measured and branded the logs in the woods, plaintiff had an equitable lien for the advances on defendant's failure to deliver.—Kline v. Cofield, Ky., 169 S. W. 477.

104. **Marriage**—Presumption. — Where two alleged marriages compete and one is proved as a fact, whether by direct or circumstantial evidence, the other cannot stand on the mere presumption founded on cohabitation and repute.—Moller v. Sommer, 149 N. Y. Supp. 103.

105. **Master and Servant**—Anticipating Injury.—A lumberman, injured by a projecting branch on a log which he turned over himself, cannot recover for the master's negligence in failng to fell the log properly with reference to the slope of the land.—Dotson v. Delorme Lumber Co., Ky., 169 S. W. 503.

106.——Assumption of Risk.—An employe injured while attempting to remove slivers from the rip saw which he was operating, who had not been warned of the dangers incident thereto, and did not appreciate the risk, did not assume it.—Rank v. Kansas City Packing Co., Kan., 142 Pac. 942.

107.——Elevator Service.—Where the owner of a building furnished elevator service to a scrubwoman, he was bound to use the highest degree of care usually exercised by prudent persons in the operation of elevators.—Coleman v. Freeman, Ky., 169 S. W. 523.

108.——Emergency. — The demand for extraordinary diligence on the part of a servant in an emergency minimizes his assumption of risk, where the emergency entirely obscures that due care which ordinarily would impel the exercise of the instinct of self-preservation.—Walton v. Georgia, F. & A. R. Co., Ga., 82 S. E. 815.

109.——Federal Employers' Liability Act.—The provision of the Federal Employers' Liability Act, that any attempt by a common carrier to exempt itself from liability for negligence of its employes shall be void, applies to all cases within the scope of the statute with like effect as though promulgated by the state legislature.—Hogarty v. Philadelphia & R. Ry. Co., Pa., 91 Atl. 854.

110.——Federal Employers' Liability Act.—The Federal Employers' Liability Act abolishes the defense of assumed risk only when the injury grows out of a violation of some federal statute enacted for the safety of employes.—Truesdell v. Chesapeake & O. Ry. Co., Ky., 169 S. W. 471.

111.——Fellow Servant.—Where an employe was injured while being transported home on a tram car operated by his master to facilitate his work, it being the employe's intention to return to work, those in charge of the tram car were his fellow servants, making the master liable for injuries to one servant from the negligence or misconduct of another.—Dwan v. Great Eastern Lumber Co., Ga., 82 S. E. 666.

112.——Licensee.—One whom defendant's vice principal requested to assist in work on defendant's premises is not a mere licensee, and defendant owes him a higher duty than that of not merely intentionally injuring him.—Eldridge v. Citizens' Ry. Co., Tex., 169 S. W. 375.

113.——Warning.—Where an occupation is hazardous, it is the master's duty to disclose all perils to which the servants will be exposed, and which are or should reasonably be

114. **Money Received**—Recovery.—The law will not allow plaintiff, in an action for money had and received, to recover all he paid defendant, merely because defendant was guilty of crime in making a gift to plaintiff's servant to influence his action.—Schank v. Schuchman, N. Y., 106 N. E. 127.

115. **Monopolies**—Defenses.—That a complainant may conduct its business in a manner in violation of the anti-trust law is no defense to a suit for infringement of a trademark.—Searchlight Gas Co. v. Prest-O-Lite Co., U. S. C. C. A., 215 Fed. 692.

116. **Mortgages** — Definition. — A "mortgage," generally speaking, is a conveyance of real estate or some interest therein, defeasible on the payment of money or the performance of some condition.—Palmer v. City of Albuquerque, N. M., 142 Pac. 929.

117.——Notice.—While a purchaser at a mortgage foreclosure sale is charged with notice of defects in advertising or other like irregularities, subsequent grantees are only required to look to the recitals in the trustee's deed.—Hinton v. Hall, N. C., 82 S. E. 847.

118. **Municipal Corporations**—Police Power.—The power conferred on a city council and commission by an ordinance to determine whether proposed construction or repairs of buildings come within the ordinance, and to abate a nuisance, is a delegation of police power, and not a judicial power, in the sense that such power is vested by the constitution in the courts.—Russell v. City of Fargo, N. D., 148 N. W. 610.

119. **Navigable Waters**—Diversion.—A public service corporation cannot divert water from a navigable stream to a reservoir necessary to the operation of a canal, where its diversion will impair the navigability of the stream.—Minnesota Canal & Power Co. v. Fall Lake Boom Co., Minn., 148 N. W. 561.

120.——Meandered Lake.—A meandered lake covering approximately 150 acres, naturally suitable for boating, bathing, hunting, fishing and other beneficial public uses, and having a village of 2,000 inhabitants on its shore, is a public or navigable body of water.—State v. Korrer, Minn., 148 N. W. 617.

121. **Negligence**—Proximate Cause.—Where a company undertook to equip plaintiff's house with a burglar alarm, and to protect it from burglarious entry, and the house was burglarized while the burglar alarm was not set, due to the negligence of defendant's employe, the proximate cause of the loss was not such negligence, but the felonious entry of the building.—Nirdlinger v. American District Telegraph Co., Pa., 91 Atl. 883.

122.——Turntable Doctrine.—The turntable doctrine imposes a liability on a property owner for injuries to a child of tender years, resulting from something on his premises that can be operated by such a child and made dangerous by him, and which is attractive to him, where he fails to protect the thing so that such a child cannot be hurt by it.—Barnhill's Adm'r v. Mt. Morgan Coal Co., U. S. D. C., 215 Fed. 608.

123. **New Trial**—Application by Both Parties.—That both parties apply for a new trial does not require the court to grant the motion of one of them unless it appears that he has been prejudiced in the trial.—John B. Carter Co. v. Cox, Ky., 169 S. W. 472.

124. **Obstructing Justice**—Removal of Books.—Removal of books and papers of corporation containing incriminating evidence from the county and state with knowledge that they would be called for by a grand jury, held obstructing justice, though no subpoena had then been issued.—Commonwealth v. Southern Express Co., Ky., 169 S. W. 517.

125. **Quieting Title**—Possession.—Under the federal equity practice, independently of a state statute, a bill to remove a cloud from title will not lie, where the complainant is not in possession of the premises, and cannot be maintained without proof both of possession and of legal title.—Rowe v. Hill, U. S. C. C. A., 215

the sale of particular mining properties and to divide the profits, their agreement was none the less a partnership because it was limited to a single venture.—Spencer v. Barnes, Cal., 142 Pac. 1088.

127.——Surviving Partner.—The partnership personal assets of testator are to be administered by his administrator, who alone, in the absence of fraud, collusion, or refusal to sue, has the right to sue the surviving partner for a settlement, though subject to their proportion of a money legacy, the will gives such assets to one set of persons, while giving testator's individual property to another.—Bane v. Adair, Va., 82 S. E. 734.

128. **Party Walls**—Use of.—A contract between adjoining lot owners, providing that when one begins the erection of a building making use of a party wall he shall pay to the other a given sum for such use, means that the contract sum is due whenever the wall is used in a building attached thereto.—Douthitt v. State Nat. Bank of Marlow, Okla., 142 Pac. 1009.

129. **Payment**—Restoration.—The rule allowing one defrauded and unable, because of changed conditions, to make restoration of benefits received to recover what he has paid, without allowance for such benefits, has no application where his inability to restore them arises from his having had complete enjoyment of them, and, in so doing, consuming them.—Schank v. Schuchman, 212 N. Y. Supp. 352.

130.——Restoration.—The rule allowing one defrauded and unable, because of changed conditions, to make restoration of benefits received to recover what he has paid, without allowance for such benefits, has no application where his inability to restore them arises from his having had complete enjoyment of them, and, in so doing, consuming them.—Schank v. Schuchman, N. Y., 106 N. E. 127.

131. **Principal and Agent**—Forfeiture of Compensation.—Where an agent willfully and fraudulently fails to account for his principal's moneys or property, he forfeits his right to any compensation for his services.—Weleetka Light & Water Co. v. Burleson, Okla., 142 Pac. 1029.

132.——Forgery.—The forgery of the indorsement of the name of a payee upon a bank check is not within the scope of the employment of an agent of the drawer to whom the check is entrusted for delivery only to the payee.—Grand Lodge of Kansas, A. O. U. W., v. State Bank, Kan., 42 Pac. 974.

133.——Undisclosed Principal.—An election to hold an agent who acted for an undisclosed principal, instead of his principal, will not be enforced unless the alleged creditor acted with full knowledge of all the facts, and did some act which would lead a reasonably prudent man, acting in good faith, to conclude that he had elected to hold the agent only.—Dameron v. Quick, Va., 82 S. E. 709.

134. **Reformation of Instruments**—Laches.—Where an alleged mistake in the description of a deed appeared on its face, and 54 years had elapsed since the making of the mistake, and all the parties, including the surveyor, were dead, and the land had greatly increased in value, complainants' right to correct the mistake was barred by laches.—Gillespie v. Davis, Va., 82 S. E. 705.

135. **Religious Societies**—Secession.—Though one or any number of members of a church organization may secede, no number, however great the majority, may secede and take with them the church property to a new affiliation, so long as a faction remains which abides by the doctrines and rules of government which the united body professed when the property was acquired.—Karoly v. Hungarian Reformed Church of New Brunswick, N. J., 91 Atl. 808.

136. **Replevin**—Tender.—Where a judgment is rendered in replevin for the delivery of personal property capable of manual delivery, it is the losing party's duty to seek out the successful party and tender a delivery of the property, but, if it is of such a bulky character that it cannot reasonably be so delivered, an offer to deliver is sufficient.—Schleuning v. West, S. D., 148 N. W. 604.

137.—**Sales**—Cash.—Where a buyer failed to pay cash on delivery, as agreed, and the seller did not promptly reclaim or show that delay in reclaiming was due to trick or artifice of the buyer, but endeavored for six months to collect the account, title to the property passed to the buyer.—Lehmann v. People's Furniture Co., Okla., 142 Pac. 986.

138.——Cash.—Where cattle were sold for cash and delivered, the seller taking the buyer's draft on a third person, whom the buyer claimed to represent, and whom he stated had the money to pay for the cattle, and the draft on presentation was dishonored, held that title to the cattle did not pass, and that the seller could recover them or their proceeds from the buyer, or any holder other than an innocent purchaser for value.—C. M. Keys Commission Co. v. Beatty, Okla., 142 Pac. 1102.

139.——Implied Waranty.—A stipulation, in an order for an automobile, that an express warranty should exclude all implied warranties held not to defeat an implied waranty that the machine should be fit for the purpose for which it was intended.—International Harvester Co. of America v. Bean, Ky., 169 S. W. 549.

140.——Offer.—Where one writes to a commission house that he has some crates of peaches for sale which he expects to net him a certain price per crate, and "would be glad to negotiate further with you," and the commission house telegraphs, agreeing to "accept your offer," it constitutes no contract binding the writer to sell at the price mentioned.—Chunn v. Evans, Ga., 82 S. E. 631.

141.——Rescission.—A secret agreement by a defendant, which contracted to build a ship for plaintiff corporation, to pay certain stockholders a commission for securing the contract, which was included in the purchase price, held to constitute a fraud which entitled the purchaser to rescind the contract.—American Ship Building Co. v. Commonwealth S. S. Co., U. S. C. C. A., 215 Fed. 296.

142. **Specific Performance**—Tender.—Where suit was instituted to compel release of a portion of the property covered by a mortgage on tender of a proportionate part of the mortgage debt, it would be regarded as a suit for specific performance, and, defendant having answered and been cast, costs would not be awarded to either party.—Harris v. Pearsall, N. J., 91 Atl. 880.

143. **Telegraphs and Telephones**—Mental Anguish.—For the sender of a telegram to recover damages for mental anguish resulting from delay in its transmission, the facts must have been such that the sender would naturally suffer mental anguish in case of delay, and they must have been known to the agent of the telegraph company.—Western Union Telegraph Co. v. Chamberlain, Tex., 169 S. W. 370.

144. **Trusts**—Conversion.—Where a thief has converted the stolen property into money or other property, a court of equity will impress a trust in invitum upon such money or property in favor of the beneficial owner so long as it has not passed into the hands of a bona fide holder for value without notice.—Pioneer Mining Co. v. Tyberg, U. S. C. C. A., 215 Fed. 501.

145. **Usury**—Holder in Good Faith.—The purchase in good faith of an existing mortgage at a discount of 10 per cent was not violative of the statute against usury.—Schanz v. Sotscheck, 149 N. Y. Supp. 145.

146. **Vendor and Purchaser**—Breach of Contract.—Where a landowner, after selling upon installments, breaches his contract, the purchaser may recover money which he has paid in an action for money received.—Seals v. Davis, Cal., 142 Pac. 905..

147. **Wills**—Attestation.—Where testator signed his name on the margin of the last sheet of his will, which signature was validly attested, and later signed between the testimonium and attestation clauses, which signature was not attested, the court properly ruled that, if the will was validly executed on the margin, such execution was not affected by what subsequently occurred.—Thomson v. Carruth, Mass., 106 N. E. 159.

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PARTIES TO ACTIONS FOR DEATH OCCURRING IN ANOTHER STATE THAN WHERE SUIT IS BROUGHT.

According to syllabus in the cases of Teti v. Consolidated Coal Co., and Tomiano v. Same, 217 Fed. 443, decided by District Court for the Northern District of New York, it was held that: "Where an action for death was brought in New York against a Maryland corporation authorized to do business in New York, for a death occurring in Pennsylvania, whether the action should be brought in the name of the parties entitled to the recovery or in the name of decedent's personal representatives was a matter of procedure to be regulated by the New York law."

Looking to the opinion in the case, we greatly doubt whether the above proposition or principle is thus squarely held, because of the two cases mentioned, it was held as to one that New York procedure governed and as to the other that the law of the state where the death occurred governed.

The distinction between the two cases is worked out on the ground that in the one case there was no more than a nominal change of parties according to procedure in the forum of suit, while in the other there would arise a substantial change. Thus in the former case, a widow, according to Pennsylvania law, had the right to sue for herself and child, and in the latter the father and mother, each or both, could sue on their own account, while by the law of New York a personal representative must sue for ferent trustee. In the parents' case, the recovery being purely personal, the New York law, it was thought, could not substitute for them a trustee to sue for their benefit.

It seems to us to be of such distinctions as this that "dreams are made of." If the court could assume that a substitute trustee for the widow, though she were suing both in a private and a trustee capacity (for the recovery is to belong to her and her child), may be made by the law of the forum of suit, because the difference of parties "is of no consequence," it would be going scarcely another step to enforce the law of the forum in appointing a trustee to sue upon an individual's right of action. If results are to be the test of the right of substitution the New York trustee could reap and distribute the benefits as well in the one case as in the other. The mother's trusteeship under the statute of Pennsylvania, independently of her personal interest in the recovery, is a statutory relationship just as intimately bound up in the right of action as is the personal interest of the parents in a recovery for death.

We may say that the trusteeship of the mother is a *status* that eliminates the idea of substitution by another trustee. It depends in no way on fitness for the office of trustee, and it seems by the law of Pennsylvania not to require the appointing power of any court or any qualification by the giving of any bond.

We think, upon the whole, therefore, that the syllabus we have quoted is not in any way a correct statement of any sound legal proposition, but that, on the contrary, the law of the place of death sued for governs at home as well as abroad, both as to

Coast Ry. Co. v. Jackson, Fla., 62 So. 210; Missouri K. & T. Ry. Co. v. Lenahan, Okla., 135 Pac. 383.

In 79 Cent. L. J. 37, we discussed editorially the question of a Petition with Counts Declaring Under Federal Law and Under State Law, it being held in Wabash R. Co. v. Hayes, 34 Sup. Ct. 729, that this could be done. The recovery under the Federal Employers' Liability Act and by Illinois statute is by personal representatives and this circumstance may have made this possible. The cases we are here discussing, if the ruling announced on the trustee idea is sound, would still obtain. If, however, a state statute, as does the Pennsylvania law so far as parents are concerned, makes recovery personal, petition could not declare under both federal and state law.

This brings the suggestion that state laws ought to be made to conform to the federal act in respect to parties having the right to sue. This being purely the remedial part of such laws, it is merely an administrative detail, and as jurisdiction to hear causes under the Federal Employers' Liability Act is vested exclusively in state courts, it would avoid useless litigation and often save cases as against statutes of limitation. Federal and state laws ought to agree upon this subject.

Possibly, also, there should be further correspondence between federal and state law as to comparative negligence, fellow servant rule and assumption of risk. In this way one suit, whether the facts may show an injury or death occurs in or outside of interstate commerce, would settle the whole controversy, and the time of the country and delay to the litigants would be greatly saved. No revision of code procedure that fails to take into consideration the lack of unity, in damage suits at least, under federal and state law should be con-

NOTES OF IMPORTANT DECISIONS

EVIDENCE—PRESUMPTION OF REGULARITY OF MAILS NEGATIVING TESTIMONY THAT LETTER WAS MAILED.—The Supreme Court of New Hampshire neatly turns the presumption that a letter mailed was received the contrary way, where there was testimony of mailing offset by testimony of non-receipt. Wilson v. Frankfort Marine Acc. & Plate Glass Co., 91 Atl. 913.

Defendant relied on mailing a letter as notice and plaintiff testified having received no letter. Defendant claimed there was no conflicting testimony as to the mailing, but the court said:

"One error in this argument is the assumption that the jury must find that the letter was written and mailed. The presumption arising from the known regularity of the United States mail service is as available for the supposed receiver of a letter as for the alleged sender. If proof that a properly addressed and stamped letter was posted gives rise to a presumption that it was received in due course, so proof that no letter was received warrants a finding that it was never posted. If this plaintiff's testimony denying the receipt of the letter was believed, the jury would be warranted in going further and finding that the letter was not posted."

It is easily understood that presumption of receipt of a letter may be overcome by testimony of its non-receipt, but this is in the case of necessity of showing receipt by addressee. Here it was necessary to show non-mailing, this case making denial of receipt go beyond what it does in a showing merely of non-receipt. In other words, negative evidence of non-receipt tends to show the non-performance of an act from which a presumption would have arisen if it had been performed. It might be difficult to formulate this situation in the way of a rule of evidence.

INSURANCE — EXCITEMENT CAUSING DEATH FROM APOPLEXY ACCIDENTAL.—The Texas Court of Civil Appeals goes quite as far against insurance companies as we thought the Massachusetts court went in their favor in a note appearing in 79 Cent. L. J. 411.

It was held by the Texas court that decedent,

against death caused by external, violent and accidental means. International Travelers' Assn. v. Bramin, 169 S. W. 389.

It was said: "We overrule appellants' contention that death from the bursting of a blood vessel in the brain, caused by insured witnessing an accidental fire is not a death by accident. The physicians in attendance upon the deceased gave it as their opinion that he died from apoplexy, caused either by the excitement of witnessing the fire, or by the fall produced by such excitement or both. Four physicians, upon a hypothetical case, including all of the undisputed facts in this case, expressed a similar opinion. The deceased was about 40 years of age, of temperate habits and in good health. He was very excitable and sympathetic. No other cause for the apoplexy from which he died is suggested by the evidence, and all of the physicians testifying in this case stated that it was a very unusual occurrence, for a man in good health and not over 40 years of age, to have apoplexy unless the same was occasioned by some external violent means, and they included great excitement as a means capable of producing death from apoplexy."

Such a ruling as this is perhaps a legitimate development of what is known as the "Texas Doctrine" in mental anguish cases, and open to the same lack of limitation in rules which has condemned the acceptance of that doctrine by other courts.

But independently of this, it seems to us that the clause in the policy refers to physical things of a violent and external nature and that in this case the chain of causation is broken by an intervening mental disturbance. Without this disturbance there would have been no apoplexy. It was the real cause thereof, and witnessing the fire was the mere occasion of its manifestation.

If a baseball fan in cheering for the home team, or a hyphenated American, for example, in rocking too greatly our neutrality boat, contracts apoplexy, we think he had better do so in Texas, if he carries an accident policy.

JURISDICTION—U. S. COURT FOR CHINA OVER MATRIMONIAL CAUSES.—Hon. Chas. S. Lobingier, judge of the above court, has delivered a most interesting opinion in the case

We agree with the learned judge upon the question of jurisdiction of the bill but not upon all the grounds he urges. For example, the jurisdiction of the court "in matters of contract," and "in civil matters" in conformity with the laws of the United States, "as provided by act of congress, is agreed to, but we decline, to think the case of Biddle v. U. S., 156 U. S. 759, which merely considered a law passed for a locality, should be considered in ascertaining what that jurisdiction is. We think, however, as the judge does, that there was a saving clause in the Act of Congress of 1860, applicable to this court, in providing that, "In all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law, including equity and admiralty, shall be extended," etc. We think the word "remedies" embraces something more than forms of procedure, and includes rights.

As to the cross-bill, which he granted to the extent of allowing divorce a mense et thoro we disagree, respectfully, with his conclusion. In the first place, we doubt whether a cross-bill for a divorce is appropriate in a proceeding for annulment. It seems to us not germane to the bill to set up such matter. The bill failing because no annulment should be granted the case ought to have gone out of court.

Independently of that, however, colonial history in this country shows that the jurisdiction of the ecclesiastical courts in matters of divorce a mensa et thoro was little regarded in this country. This seemed especially so as to the New England states. II Howard Hist. Matrimonial Institutions.

The Puritans seemed too intent to get as far away as from here to Tipperary from all religious and ecclesiastical matters existing in the mother land.

The English rule may have seemed applicable to conditions in Virginia, but in other Southern colonies it may have been difficult to say the rule of aptitude to our conditions was recognized.

In the middle colonies applicability of the English rule, as a part of their common law, is somewhat hard to discern. Therefore, we doubt whether there was any common law rule on this subject that might be applied by the China court, and our federal government having no common law of its own, a specific very properly held not maintainable under the facts before him, but divorce depends very strictly upon statute, and there is no existing statute or common law right in this regard conferred on the China court.

RECENT DECISIONS IN THE BRITISH COURTS.—EFFECT OF WAR ON NEUTRAL VESSELS.

In view of the possible interest of neutrals in captured enemy ships and their cargoes, we think an account of how the British Prize Court is adjudicating on them will be acceptable to readers. In the first place, an important change in the procedure of the court has been made since we last wrote. In the case of The Chile, the president (Sir Samuel Evans) indicated that an enemy had no right of appearance in a British court and he disallowed an affidavit for an enemy owner, such a person being totally ex lege during the war. And that undoubtedly was the rule on which Lord Stowell proceeded in the case which occurred during the French wars. But in a lengthy judgment issued the other day that practice has been reconsidered and definitely changed. It has been now laid down that if an enemy shipowner thinks he can make out a case why his property should not be condemned as prize, or should merely be detained during the war and not condemned absolutely, he is at liberty to appear in the Prize Court and argue to that effect. The reasons given for this vital change were two-fold, first the expressions of international opinion as contained in the Hague conventions, which though not ratified and therefore not law in a proper sense of the word, were yet in the opinion of the court entitled to great respect, and second, the general rightness of the thing, for to quote the president: "It is to be remembered that in the international commerce of our day, the ramifications of the shipping business are manifold, and others concerned, like underwriters or insurers, would feel a greater sense of fairness and security, if, through an owner, though he be an enemy, the case for a seized or captured Tommi for 30,000 marks and Rothersand for 35,000 marks. Wire acceptance." An acceptance was wired by return. The vessels arrived at English ports flying the German flag on the 5th of August and were seized. It was argued that the seizure was incompetent, the ships being by that time British ships, the property having passed from the German to the English concern. It was indeed an intricate question whether the property had passed, but the Prize Court right away said that they would not concern themselves with the niceties of that legal question, but would regard only the essential qualities of the transaction and held accordingly that such a transfer, not being bona fide, could not defeat the rights of belligerents. Accordingly, they found that the ships had ben rightly seized and pronounced a detention order. In the course of his judgment, the president pointed out that by the declaration of London the enemy character of a vessel is determined by the flag.

One of the principles of British law which was falling out of sight, but the wisdom of which this war will justify, is that no foreign subject can own a share in a British ship. The great popularity of the limited company has largely nullified that rule, for a company registered in this country is a separate person in the eye of the law, a British person, and so can own a ship independently of who the shareholders are that constitute the company. In the cases mentioned, the Prize Court referred to that practice and intimated that these legal subtleties must not be assumed as binding on a prize court. There was not a single shareholder of British nationality in the English company which purported to buy the Tommi and the Rothersand. Could a company of aliens own a British ship? That question the court did not find it necessary to decide as they had already found that no competent transfer had taken place; but, said the president, "I do not want it to be assumed that the Prize Court could not say, looking at the realities of this thing, that even if the transfer has been completed, these vessels ought to be regarded as German ships."

The other British courts have not, however,

does not apply to a company registered in the United Kingdom. That was held in two recent cases, in one of which only one share out of 25,000 shares of £1 each was held by a British subject, and even he was a naturalized German—and all the rest were held by Germans resident in Germany. The case was thus as strong as possible in favor of identifying the company with its shareholders, but the court decided that it was in law a British person separate and distinct from them.

Lastly we note the case of the Miramichi which was singularly free from complications. A cargo of wheat shipped from America to Rotterdam before the outbreak of the war under a c. i. f. contract was seized en route after the outbreak of the war. The court held that at the time of the seizure the property in the goods had not passed to the buyers and the wheat being then the property of an American subject was not liable to seizure. It will be noted with regard to this case that the cargo having been shipped before the commencement of hostilites the question of its being contraband did not arise.

DONALD MACKAY.

Glasgow, Scotland.

THE UNITED STATES SUPREME COURT AND THE FRANK CASE.

In refusing to grant a writ of error in the famous Georgia case of State v. Frank, Mr. Justice Holmes, of the United States Supreme Court, had occasion to remark recently that he doubted seriously "if the petitioner (Leo M. Frank) has had due process of law." This assertion has elicited much editorial comment in the press throughout the country. The court and its rules of procedure have come in for their share of criticism; whether justly or unjustly so, shall presently be seen.

At the outset it must be remembered that "law" comprises a body of rules; that "law of the land" or "due process of law" includes procedure as well as substantive law, that it requires the observance in practice of those settled rules and principles which, from the experience and usages of interests. Individual interests, moreover, are to be protected because and in so far as they are social interests—social interests to the extent that securing them "conduces to general security of institutions and the general moral and social life of individuals."[1] Therefore, a fixed rule of practice or procedure has as material a bearing to social interests as a rule of substantive law; it is as material a part of law and the administration of justice as a rule of substantive law itself. So long as the rule exists, and has been tested by the wisdom of ages and experiences of men trained in the law, the courts must adhere to it, and this, regardless of the condoning circumstances of any particular case. The courts must administer "justice according to law," else out of order comes confusion and a reversion to the primitive state of legal chaos and savagery. Let us inquire into the principles by which the court is governed in this instance.

An appeal to the United States Supreme Court is regulated by definite and unequivocal rules of practice. A final judgment or decree in the highest court of a state, where the validity of a state statute, process, etc., is drawn in question on the grounds of its being repugnant to the federal constitution, may be examined and reversed or affirmed by the supreme court upon a writ of error.[2] Moreover, while this is the general and proper practice, the same result may be reached by application to an inferior federal court for a writ of habeas corpus to test, in the light of the constitution, the validity of the accused's detention and custody by state authorities. From the inferior court there is an immediate and less cumbersome appeal to the supreme court. This course by the writ of habeas corpus, however, is to be pursued only in extreme and urgent cases, as, for example, where there is a grave danger of irreparable injury to the accused by reason of a long incarceration by state officials, or the like. The issuance of this writ operates as a serious interference with state machinery, and so, it has been said, it must not be allowed to become a working substitute for the writ of error.[3]

A writ of error may be procured either in the state court or in the supreme court; in the state court, it must be signed by the presiding judge; in the supreme court any one justice is authorized to sign it.[4] Further, an application for the writ is addressed to the sound discretion of the judge; the writ does not issue as a matter of absolute right.[5] It is apparent that any other rule would result in opening the door of the court to prolonged litigation and endless trials; it would furnish a subterfuge for delays based on all manner of pretext, and so would allow criminals to impede the due course of justice and law. That such an uncontrolled discretion in one judge is open to abuse no one would deny, but that it is ever actually abused everyone familiar with courts and their processes would be quick to deny. The integrity and impartiality of our judges themselves are inseparably interwoven in the fine texture of our legal fabric; adequate means, moreover, are at hand to prevent undesirable characteristics from desecrating the courts.

In order that the grant of a writ of error by a supreme court justice may be justified, a federal question must have been raised in the state court before the case reached a final judgment; it must appear upon the face of the record of the case that a federal question was raised in due time in the state proceedings.[6] Under the provisions of the judicial code,[7] the supreme court is without jurisdiction to review a case on appeal from a state court unless a federal right was denied the petitioner. If the federal question does not distinctly and postively appear, it cannot be said that a federal right was denied, for nothing is more fanciful than the contention that the state denied a right which was never asserted. In numerous cases it has been held that it is too late to raise the federal question for the first time upon the petition for a rehearing in the state court.[8] Moreover, in a criminal case in Nebraska, somewhat similar in its legal aspects to the present case, a constitutional question was raised in a petition for rehearing, and the supreme court held that it had no jurisdiction and refused to go into the merits of the claim.[9] The supreme court, furthermore, has adopted a very liberal policy, and generally looks to the practice of the state court to determine whether the federal question was brought into the issue in time.[10] If the state court decides that it was raised too late and accordingly proceeds to pass judgment without deciding the federal question, it would seem that the supreme court would be without jurisdiction to review the case. This is precisely what occurred in the Frank case. The state court, in passing upon a petition for rehearing in which the federal question was definitely raised for the first time, held that the defendant was "estopped" by his acquiescence from asserting the right, that the case for this purpose had already reached a final adjudication. Admitting without discussion that this species of "estoppel" is without a fellow in our system of jurispru-

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(3) Guthrie, Fourteenth Amendment, 177; U. S. Rev. Stat., §§ 751, 753.

(4) Bunn, U. S. Courts, 23; U. S. Rev. Stat., §§ 999, 1003.

(7) See Note 2.

(8) Guthrie, Fourteenth Amendment, 155, and cases cited there in footnote 2; Miller v. Cornwall R. R. (1897), 168 U. S. 131; see Caldwell v. Texas (1891), 137 U. S. 692, 698; Consol

dence, it is obvious, nevertheless, that the supreme court by its rules of practice was constrained to follow the state court and, therefore, was without jurisdiction to review the case. The state court expressly declined to pass on the federal question, and so the defendant's petition for a writ of error disclosed the fact that the federal right claimed could not possibly have been denied.

There is another aspect to the case. The supreme court has often held that a writ of error should not be granted when it is apparent that the issuance of the writ would result only in affirmance of the decision in the state court.[11] Assuming, then, that the federal question was raised or that there is a doubt whether the state court, by framing its decision as the Georgia court did, can successfully deprive a party from asserting a federal right, the refusal of the writ of error in the supreme court might be taken as an indication that the particular right claimed was not colorable. The defendant's contention that he was deprived of "due process of law" because he was not present in court when the verdict was rendered seems untenable. That it is unsound would seem to follow from cases holding that the fourteenth amendment does not prevent trial by a jury composed of eight men only,[12] nor require an indictment by grand jury[13] in criminal cases, in the state proceeding. The tendency of the supreme court has been to leave less important matters of procedure to the respective states to regulate, for the reason that these questions do not pertain to fundamental rights. Indeed, the fact that in this particular case the state court, inspired by the fear of lynch law, and, therefore, solicitous of the public welfare, decided that the public welfare demanded that the de-

no right in the individual superior to the social interests; the individual cannot assert a right to the prejudice of the public at large, and in the same breath, claim it as an inherent and fundamental right. In the very apt words of Mr. Justice Matthews:[14] "To hold that such a characteristic is essential to due process of law would be to deny every quality to the law but its age."

The refusal by the supreme court justice to grant the writ of error was accompanied by an intimation that there was a grave doubt whether due process of law had been accorded the defendant in the state court. The lay mind is slow to comprehend how the refusal to grant the writ and the opinion of the learned justice as to "due process" can consistently stand together. When a jury bring in a verdict of acquittal, the judge, by rules of law, is bound to discharge the defendant regardless of the fact that he himself might have a firm conviction of the defendant's guilt. Yet no one would dare to censure the judge for disregarding his personal opinion in the premises. The judge of the court is governed exclusively by rules of law. So in the Frank case, the learned justice exercised a discretion afforded by law and in the light of principles and rules of law. The *obiter dictum,* therefore, with reference to the individualistic aspects of the case, far from being a reflection upon the court and court procedure, must serve to impress the thinking public with the sanc-

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(14) See Hurtado v. California, supra, at p. 529. The case of Hopt v. Utah (1884), 110 U. S. 574, is not an authority for the proposition that the Fourteenth Amendment requires the presence of the defendant in court upon the reception of the verdict. In this case the passive acquiescence of the defendant to the challenging of jurors in his absence was held not

tity of the courts; it must serve to teach the public that the due administration of law rests as much with the people as with the courts, and that there is some certain solemnity and gravity attached to the sealing and rendition of a verdict by a jury of freemen. The abuse of that attribute of self-government by the people will not work like corruption upon the court; the court will continue the impartial and impersonal administration of "justice according to law." In conclusion, nothing is more evident than that criticism which erroneously attaches blame to the judiciary is destructive and not constructive, it serves to tear down, and not to build up, our legal system. GULLIE B. GOLDIN.

New York, N. Y.

BANKRUPTCY — WHO EXEMPT FROM INVOLUNTARY PROCEEDINGS — PURPOSE OF EXEMPTION.

The Federal Bankruptcy Act of 1898, as amended June 25, 1910, provides that "any natural person except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company and any moneyed business, or commercial corporation except a municipal, railroad, insurance or banking corporation, owing debts to the amount of one thousand dollars or over," may be adjudged an involuntary bankrupt.

What is the purpose of exempting wage-earners, farmers and tillers of the soil? Is it a mere political sop to those particular classes of persons—an arbitrary act of favoritism—or is there some underlying principal which actuated Congress?

It is hard to discover any sound reason for the exception, but we have a right to suppose that reasons other than petty political ones governed our national legislators.

We have made quite an extended search, however, for the reasons but decisions throw but little light on the subject. Possibly the exception of this particular class of persons was on the ancient theory that those who produce the staple articles for the sustenance of the nation should not be interfered with in their work which is so essential and vital to the nation in times of both peace and war.

In re Johnson, 149 Fed. Rep. 864, the court says: "Congress thought it wise to exclude farmers, those engaged chiefly in the tillage of the soil from the classes who may be adjudged involuntary bankrupts. It was thought that this would encourage farming or at least not discourage persons of small means from purchasing farms and implements on credit."

If the only reason for the excepting is that stated by the court in this case, we must confess that the theory is very fine spun.

The cases are numerous stating that which the Act itself plainly indicates, that the person's *chief occupation* must be that of farming or tillage of the soil. Whether this is his chief occupation depends not only upon whether it occupies most of his time but also whether it brings him most of his income. But the question remains,—how closely must one's work be connected with the soil in order to bring him within this exception?

Would one who from choice or physical inability did no particular work except care for a small garden and raise a few chickens on the city lot where he resided, be considered within this exception? In a sense, he would be *a tiller of the soil* and that would be his *chief* occupation. Would it not be stretching the law, however, to say that it intended to exempt such a person?

Again, suppose a florist occupies a city lot or two with green houses. His plants and flowers grow in the soil which requires some cultivation to properly mature them. But did Congress intend that a florist could not be adjudged an involuntary bankrupt? Is the soil such a sacred thing that anyone who in the slightest manner touches or has to deal with it can contract large indebtedness, make fraudulent transfers of his property and then laugh his creditors in the face and defy them by saying that the bankruptcy law exempts him from being declared an involuntary bankrupt because he is a "tiller of the soil?"

Why should these persons receive more consideration than the grocer, the butcher, or dry goods merchant, who each contribute to the welfare of society?

The cases hold that farming as contemplated by the bankruptcy act may be by tillage of the soil or by raising cattle, etc., on farm land used for that purpose; but if we understand their language correctly, the occupancy of the land must be for some form of *agriculture.*

Century Dictionary and Cyclopedia defines "tiller" as follows:—"One who tills; a husbandman; a cultivator; a *plowman.*" (Italics ours).

In Wolburn v. Drake, 120 Fed. Rep. 493-495, the court, speaking of the terms "farmer" and "tiller of the soil," says:—"Within the purview of this statute (meaning the bankruptcy statute) it is understood to mean the business of cultivating land or employing it for the purposes of husbandry."

28 Am. & Eng. Encyc. of Law (2nd Ed.), p. 208, defines "tillage" as follows:—"The cultivation of land *particularly by the plow.*" (Italics ours). See also 38 Cyc. 304, U. S. v. Welbarnes, 18 Fed. Rep. 475.

15 Am. & Eng. Encyc. of Law (2nd Ed.), p. 904, defines "husbandry" as follows:—"The business of a farmer comprehending the various branches of *agriculture.*" (Italics ours).

Webster defines "agriculture" as follows:—"The art or science of cultivating the ground *especially in fields or in large quantities,* including the preparation of the soil, the planting of seeds, the raising and

Black's Law Dictionary defines "husbandry" is follows:—"Agriculture; cultivation of the soil *for food;* farming in the sense of operating land to *raise provisions.*" (Italics ours).

The term "farmer" means a man who cultivates a considerable tract of land in some one of the usual recognized ways of farming. O'Niell v. Pleasant Prairie Ins. Co., 71 Wis. 621, 38 N. W. 345-6.

"In Vigar v. Dudman, L. R. 7, C. P. 72, affirming L. R. 6, C. P. 470, it was held that where a house was built upon a portion of an acre field and the other portion to the extent of 22 perches converted into a garden by the owner who fenced off the house and garden from the rear of the field, the remaining portion being used as an orchard, the manner in which the field had been dealt with did not amount to conversion of it or any part of it into tillage." Note 2, 28 Am. & Eng. Ency. of Law (2nd Ed.), p. 208.

While it has been held that there is a distinction between a farmer and a tiller of the soil, and that the exemption does not mean farming by tillage, (In re Thompson, 102 Fed. Rep. 287), is it not reasonable to suppose that Congress had in mind the cultivation of *fields on an extended scale* and for *the production of some kind of food?*

C. C. Raymer.

Elkhart, Indiana.

MANUFACTURER—LIABILITY TO SERVANT OF PURCHASER.

TOM v. NICHOLS-FIFIELD SHOE MACHINERY CO.

Circuit Court of Appeals, First Circuit. July 10, 1914.

215 Fed. 881.

Where plaintiff's employer purchased a die-cutting machine from defendant to be set up and operated in his factory, and plaintiff while operating the machine in the course of his employes shortly before the accident, plaintiff having no knowledge that the head piece was liable to fall when his foot was not on the treadle, whether defendant was negligent in constructing and setting up the machine, whether such negligence, if any, was the proximate cause of plaintiff's injury, and whether plaintiff was himself negligent, were for the jury.

BINGHAM, Circuit Judge. This is an action for personal injuries sustained by the plaintiff (plaintiff in error), while in the employment of Habib Tom and engaged in operating a die-cutting machine, sold and delivered by the defendant (defendant in error) to and set up by it in the factory of said Tom in contemplation of its being operated by the plaintiff.

The declaration contains three counts. The defendant demurred to the declaration, and the demurrer was overruled. It was held, on the authority of Huset v. Chase Machine Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303, that the second count stated a good cause of action.

At the close of all the evidence a verdict was directed for the defendant, and the plaintiff excepted. No question is here raised as to the second count stating a good cause of action. The only question is whether the evidence was sufficient to warrant the submission of the case to the jury.

The defendant contends that there was no evidence warranting the jury in finding: (1) That the plaintiff's accident was occasioned by a defect in the machine that existed at the time it was sold and installed; or (2) that the defect in the machine was one that rendered it imminently dangerous to life and limb of the plaintiff; or (3) that the defendant knew of the defect and concealed his knowledge of it from the employer; or (4) that the plaintiff was in the exercise of due care.

The machine consisted of a wooden bed, upon which the operator placed the material to be cut. Having spread out the material upon the bed, steel dies were placed upon it, and were driven through the material by a blow from the headpiece or beam, the fall of which was accentuated by power. The power was applied and shut off by means of a treadle, which, when pressed down, caused a friction cone pulley to be engaged by a belt-driven pulley that inclosed it. When the pressure was released, the treadle was raised by springs, and the cone of the pulley was withdrawn, shutting off the power. The machine was also equipped with a brake, which consisted of an iron ring, the ends of which were kept apart by a square plug. Turning this plug sideways forced the ends of the ring farther apart, so that the ring was expanded against the inside of the flange of the pulley, checking the motion. The construction was such that when the treadle was down and the power applied the brake was released; and when the treadle was raised and the power shut off the brake was applied. The headpiece weighed about 600 pounds, and when the power was shut off and the headpiece was up it was held in position only by the brake. When the treadle was operated it rocked a shaft to which an arm was attached. This arm was connected with a brake lever by a link or screw, which was a threaded rod supplied with nuts, the end of which passed through the eye of the brake lever. At the opposite end of the brake lever was the square plug which expanded the ring against the inside of the flange of the pulley, as above stated. The treadle was held up by two strong spiral springs, the force of which, when the foot was taken off the treadle, caused the shaft, and the shaft arm connected with it, to be rocked away from the operator, and the end of the screw link to be thrust farther through the eye of the brake lever, bringing a rubber plug on the link hard against the brake lever, causing the lever to turn the square plug sideways and expand the ring and apply the brake. This rubber plug was cyclindrical in shape, and inclosed the link for about an inch and a half. It had on one side of it two nuts, which were locked together, and on the other side was the brake lever, through the eye of which the end of the link passed. When the operator pressed the treadle down with his foot the shaft and its arm would rock towards the operator, tending to withdraw the link from the eye of the lever. If the end of the link were withdrawn from the eye of the lever when the treadle was pressed down, then when the treadle was raised again, the connection between the arm of the shaft and the lever having been broken, the brake would not be applied, and there would be nothing to hold the beam up.

(1) The evidence tended to prove that the plaintiff was injured by the headpiece or beam falling and catching his hand and arm between it and one of the dies, while he was smoothing the cloth and placing the dies preparatory to operating the machine; that he had not placed his foot upon the treadle, the treadle being up at the time, and that he had reason to believe the headpiece would remain up until the treadle was again pressed down; that the link or screw was too short to prevent its being drawn through the eye of the lever,

unless two nuts or some other sufficient means were placed upon the end of the link to prevent its being drawn through, or, if the link was not too short, that the arm of the shaft was improperly adjusted upon the shaft so that it drew the link or screw too far back when the treadle was pressed down, causing the link or screw to be withdrawn from the eye of the lever and disconnecting the brake; that at the time the machine was set up there was but a single nut upon the end of the link, and that no change in this respect was made down to the time of the accident; that in the operation of the machine, in the natural and expected course of events, this single nut would be and was backed off the end of the link, allowing it to be withdrawn from the eye of the lever; that on the succeeding operation of the machine, when the head beam was up, the link being withdrawn from the eye, so that the brake would not work, the beam fell, and injured the plaintiff; that the reason the head beam did not immediately fall upon being raised was that it was temporarily held by cams or eccentrics on a dead center, and shortly afterwards, being released therefrom by the jar of the motor on the floor, the beam fell; that the difficulty with the brake could and should have been obviated in one of the following three ways: By making the link so long that it could not be drawn through the eye when the treadle was pressed down, or by readjusting the arm on the shaft so that it could not draw the link back far enough to release it from the eye, or by locking the nut with a check nut upon the end of the link so that it could not be backed off and allow the link to be withdrawn from the eye. Although the machine was not new at the time it was purchased of the defendant, it had been operated but a short time, and was represented to be in perfect condition and as good as new. All its parts had been gone over and rebuilt by the defendant, and it knew when the sale was made that the machine was to be set up in purchaser's factory, where he employed a number of people, and was to be operated by his men.

It also appeared that it was arranged the defendant should set up the machine in the factory, ready to be operated; that a day or so after the purchase was made the defendant delivered the machine at the factory, set it up, operated it, and notified the purchaser that it was ready for use; that the purchaser him-

a new rubber plug; that thereafter the machine worked perfectly down to the time of the accident to the plaintiff, which occurred some four weeks after the sale was made; that at that time the single nut worked off the end of the link and allowed the link to be drawn through the eye of the lever; that this was due either to the want of a check nut to lock the nut on the end of the link, or to the link being too short, or to the brake mechanism between the lever and the shaft being rendered too short by the way in which the arm was adjusted upon the shaft; and that the defendant knew this was an unsafe and dangerous way to construct or set up the machine, and that no one would discover it but a skilled mechanic, and then only after a thorough examination.

We think the jury could reasonably have found from the evidence that the machine was defectively constructed or set up; that the head beam was liable to fall at any minute, and that the machine was therefore imminently dangerous to any one who should undertake to operate it in the way it was designed to be used; that, constructed as it was, with a single nut upon the end of the link, it was a mere trap; that the defendant knew it was to be operated by the purchaser's employes, of whom the plaintiff was one; that the defendant, having overhauled the machine and set it up, knew its condition, and that it was dangerous, and not only concealed the situation from the purchaser and his employes, but lulled them into security by giving them to understand and believe that the machine was properly constructed and set up. It could also be found that the plaintiff was in the exercise of due care. Although he knew it was dangerous to place his hand on top of the dies when his foot was on the treadle, he did not know that the head beam was liable to fall when his foot was not on the treadle, and reasonable men might fairly conclude that he was not negligent in what he did.

(2) We are also of the opinion that the circumstances disclosed by the case show that the defendant owed the plaintiff a duty to exercise care in setting up the machine, and that this duty did not arise out of the contract of sale between the defendant and Tcm, but out of the relation existing between the plaintiff and the defendant, and irrespective of the contract of sale. "The law governing actions for negligence has for its foundation the rule of

erty, or rights of another. It is a rule of relation. If there be no relation there is nothing upon which the rule can operate." Garland v. Railroad, 76 N. H. 556, 86 Atl. 141, 46 L. R. A. (N. S.) 338, Ann. Cas. 1913E, 924. When, however, one knows or has reason to believe that his conduct may affect injuriously the person or property or rights of another, then a duty arises requiring him to exercise reasonable care to see that his acts do not result injuriously to the person or property or rights of that other. So in this case, when the defendant set up the machine in the factory, knowing or having reason to anticipate that the plaintiff and his fellow employes were to operate it, the law imposed a duty upon the defendant, with relation to the plaintiff and these men, to exercise reasonable care in setting up the machine, and rendered it liable in damages for a breach of the duty in case one of them was injured while operating the machine and as a result of its having been negligently set up. Gill v. Middleton, 105 Mass. 477, 479, 7 Am. Rep. 548; Baird v. Daly, 57 N. Y. 236, 15 Am. Rep. 488; Devlin v. Smith, 89 N. Y. 470, 478, 42 Am. Rep. 311, Pittsfield Co v. Shoe Co., 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116; Id., 72 N. H. 546, 58 Atl. 242; Hubbard v. Gould, 74 N. H. 25, 28, 64 Atl. 668; Dustin v. Curtis, 74 N. H. 266, 268, 269, 67 Atl. 220, 11 L. R. A. (N S.) 504, 13 Ann. Cas. 169; Burnham v. Stillings, 76 N. H. 122, 123, 79 Atl. 987.

Whether the defendant's act in negligently setting up the machine was the proximate cause of the plaintiff's injury was a question of fact for the jury, there being evidence from which such a conclusion might reasonably be drawn. It appeared that the defendant's men went to the factory of the purchaser, saw the place where the machine was to be operated, saw that a number of men, including the plaintiff, were employed there, and knew that they were likely to be called upon to run the machine. Under these circumstances, it could not be said as a matter of law that the defendant had no reason to anticipate that the plaintiff would be set to work on the machine, or that the injury which he received was not the proximate result of its negligence in improperly setting it up. Ela v. Cable Co., 71 N. H. 1, 3, 51 Atl. 281.

The judgment is reversed, the verdict is set aside, the case is remanded to the District Court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers his costs of appeal.

NOTE.—*Recovery by Third Person for Breach of Duty to Another.*—The instant case well says that actionable negligence is predicated on a rule of relation between parties and this is well illustrated in the case of Garland v. Railroad, 76 N. H. 556, 86 Atl. 141, 46 L. R. A. (N. S.) 338, Ann. Cas. 1913E, 924, cited by the instant case. The Garland case showed that a trespasser riding on a train in a place where his presence was not known was killed as the result of a head-on collision. See also Feeback v. Missouri P. R. Co., 167 Mo. 206, 66 S. W. 965. And this rule was extended to one not so strictly a trespasser, but an employee, who was injured by an unguarded shaft starting up while he was performing gymnastic stunts thereon. Talkington v. Washington Veneer Co., 61 Wash. 137, 112 Pac. 261, 44 L. R. A. (N. S.) 1061. The writer of the opinion gave it as his individual opinion, that the employer should have given the plaintiff, a minor employee, warning in the matter.

It also has been held that the duty to block frogs in railroad yards was not a duty owing to a trespasser. Akins v. Chicago, St. P. M. & O. R. Co., 58 Minn. 540, 60 N. W. 669.

These cases were all against defendants in charge of and using the machinery causing the injury, but they go upon the theory of relationship. But the instant case is against one, who sold and set up the machinery, and the question is of relationship over and beyond his immediate purchaser.

Relationship is held by the instant case to arise out of knowledge of the use to which the machinery is to be devoted or applied. The doctrine bears some resemblance to the Turn-Table Doctrine, and, in a measure, to the theory of nuisance.

But the relationship may be destroyed where there is a contractual duty between one and an injured plaintiff. Thus in Dustin v. Curtis, 74 N. H. 25, 67 Atl. 220, 11 L. R. A. (N. S.) 504, 13 Ann. Cas. 169, which case rules that, where a landlord under agreement to repair fails to do so, and his tenant suffers an injury from such failure, the latter has no action in tort therefor. This question has been ruled differently, in a few cases. Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289. This case held that negligence in this regard made the landlord "liable to persons lawfully on the premises, who are not guilty of contributory negligence on their part." This suit was by the tenant, but the above intimation extends right of action to others. The Dustin case treated was one by the tenant, and the Minnesota case seemed to think a tenant's rights ought to be as good as those of a third party.

Gill and wife v. Middleton, 105 Mass. 477, 7 Am. Rep. 548, was an action for injuries to tenant's wife by a landlord's negligence in the making of repairs. The opinion does not discuss the relationship of the wife to the landlord, but argues in such a way as if he would have been liable to the tenant himself. The landlord was held liable to the wife.

The case of Baird v. Daly, 57 N. Y. 236, 15 Am. Rep. 488, cited by the instant case, seems not to involve the question before the court.

The case of Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311, seems very much in point, defendant constructing a scaffold defectively, on which another's servant, the plaintiff's intestate was put to work. By reason of defective construction, it gave way and plaintiff's intestate was killed. It was claimed there was no privity between defendant and the servant. The court said: "As a general rule the builder of a structure for another party, under contract with him, or one who sells an article of his own manufacture, is not liable to an action by a third party, who uses the same with the consent of the owner or purchaser, for injuries resulting from a defect therein, caused by negligence. * * * But notwithstanding this rule, liability to third parties has been held to exist when the defect is such as to render the article in itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use."

The court reasons from cases that the merely fortuitous use by a third person in a way not to be contemplated, as, for example, the purchaser lending to a friend a defectively constructed carriage and injury to the friend therefrom, would not make the seller liable. But where a scaffold is built for the express purpose of enabling workmen to stand thereon, the case is different.

Caughtry v. Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387, was a scaffold case and the court said there was a duty resting on defendant in favor of workmen, third parties to the contract.

An independent contractor engaging with the owner of a building to keep it heated so that the water pipes designed for the protection of tenants from bursting, owes the tenants a duty and was held liable for injury to their goods for such bursting. Pittsfield Cotton Wear M. Co. v. Pittsfield Shoe Co., 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116.

These cases are not wholly unlike in principle to those which hold the manufacturer of food products liable to the customers of his customer, and as to these it is considered, that as he intends his products to be bought by the public he owes it a duty. The old theory of privity resting on contract does not exhaust the situation —parties must look beyond this and be regarded as having something else than a mere moral obligation in the premises. C.

ITEMS OF PROFESSIONAL INTEREST.

THE REPORT OF THE PROCEEDINGS OF THE NEVADA BAR ASSOCIATION OF 1914.

The third annual meeting of the Nevada Bar Association was held in Reno, Nevada, on November 20 and 21, 1914, and convened for two days, followed by the annual banquet on the evening of the 21st.

Owing to the illness of the president, George S. Brown, Vice-President Charles S. Chandler, of Ely, Nevada, presided, and delivered a very interesting address on the subject of "Special Verdicts in Jury Trials," advocating the abolition of the general verdict and substituting therefor special findings on matters of fact to which the court should apply the law. Mr. J. Poujade, of Carson City, Nevada, read a paper on "The Coming Law," and Hugh Brown, of Tonopah, Nevada, epitomized the 1914 meeting of the American Bar Association.

The section on amendments to substantive law recommended that the section on constitutional amendments be instructed to prepare an amendment to the constitution providing that the term of office of district judges be increased from four to eight years, and the term of office of justices of the supreme court be increased from six to twelve years. It further recommended a codification of the general election laws of this state so that the primary law may be changed to provide in some manner for a fixed responsibility in the selection of nominees for public office, and that the selection of judges be made without regard to political party affiliation, which is conformable to the canons of professional ethics adopted by the American Bar Association.

The section on civil procedure, pleading and practice, recommended certain changes tending to simplify the method affecting appeals, as well as a general change in the pleading of defenses in civil actions.

The section of legal education and admission to the bar, recommended the passage of an act tending to raise the legal requirements of applicants for admission to the bar, provided among other things "that no student candidate shall be eligible for the bar unless he shall have devoted at least three years in preparing for such admission, either by diligent study of law while holding a bona fide clerkship in a reputable law office in this state, or by a three years' course in an approved law school, or by three years' diligent study of the law under the direction of some qualified member of the bar in this state. Students, other than those who prepare for admission to the bar by a three years' attendance at an approved law school, shall, before beginning the required three years' study of law, register with the supreme clerk of the state of Nevada."

It was ordered that the section on legislation should prepare a bill providing for nonparisan election of members of the judiciary and submit the same to a referendum vote of the members of the association, and if carried, to have same introduced and advocate its passage at the session of the legislature of 1915.

The following were elected officers for the ensuing year:

Robert G. Withers, President, Reno.

Charles S. Chandler, Vice-President, Ely, Nevada..

William Hatton, Vice-President, Goldfield.

Robert M. Price, Treasurer, Reno.

Edward F. Lunsford, Secretary, Reno.

The following gentlemen responded to the designated toasts at the banquet given on the evening of Nov. 21, at which L. A. Gibbons presided as toastmaster:

Hon. A. E. Cheney, "United States Constitution;" J. A. Saunders, Esq., "Respect for the Law;" H. M. Hoyt, Esq., of Reno, "Appointment of Judges;" R. C. Stoddard, Esq., "The Law and the Lady;" a paper was read by the toastmaster, which was prepared by Hon. George F. Talbot, on "The Bench, the Bar and the Public."

BOOK REVIEWS.

U. S. COMPILED STATUTES, 1913.

This very comprehensive work contains all the laws of the United States, general and permanent in their nature, in force December 31, 1913, arranged according to subject-matter and following the order of familiar titles, chapters and sections of the Revised Statutes. Therefore, lawyers who have Gould and Tucker's notes or other annotations of federal statutes may use them as readily with the Compiled Statutes as with the Revised Statutes or the Statutes at Large.

The editorial work in this compilation has been done by Mr. John A. Mallory, editor of Compilation of 1901, assisted by members of the West Publishing Co.'s editorial staff, and its most noteworthy features consist of the historical and explanatory notes after each section. Here is given a complete history of each enactment, embracing also such other information as to prior enactments, repeals, etc., as is often very necessary as aids to construction.

The index to these four volumes is to be deemed a model, and though based on that of the Revised Statutes, it has been greatly elaborated, representing in this way the best thought of specialists having large experience in preparing statute indexes.

The work contains tables showing amendments and repeals, chronology of laws, and popular names of acts running from 1789 down to date.

There will be current continuations of this compilation published from time to time in advance sheets of the Federal Reporter. Besides, Acts of Congress will be published in suitable installments and the publication will show their relation to this compilation.

This work has been made necessary by the enormous mass of legislation on a wide range of subjects not covered by the Revised Statutes, and the cumulative supplement plan is by it displaced, very much to the advantage of practitioners for easy handling.

The publication is in the best style of the great house from which it hails and there can be little doubt but it will come into instant demand by the profession, the publishers being West Publishing Co., St. Paul, Minn., 1914.

HUMOR OF THE LAW.

Mr. M. is a very ministerial looking attorney. While in Philadelphia, some time since, he, with a group of other attorneys, visited the famous Girard Institute, an orphanage for boys. As they passed in the front door, one at a time, they were closely scrutinized by the uniformed guard who stood at the door. When Mr. M. approached the door, the guard stopped him.

Guard: "I beg your pardon, sir, but you cannot go in there."

Mr. M., astonished, inquired: "Why, not?'

Guard: "By the terms of the founder's will, no minister should ever be allowed to enter this institution."

Mr. M.: "That's a hell of a note."

Guard: "I beg your pardon, sir; you may go in."

Alhough the French courts are conducted with more ceremony than our own, they are occasionally enlivened by amusing incidents.

Maitre Caseneuve, a famous advocate of Touloise, long since dead, had a pet dog of which he was very fond. One day he ventured to take this dog, which was small, and named Azor, into court with him. He seated Azor at one end of the bench assigned to the counsel, and began an argument.

Maitre Caseneuve had a high-pitched voice, and as he warmed up with his plea, he raised it to a loud tone. Azor could stand it no longer. He stood up on the bench and howled.

Maitre Caseneuve moderated his voice, and cuffed the dog "aside," whereupon Azor subsided into silence. The lawyer argued on, and by and by, forgetting himself in his earnestness, raised his voice once more to a high pitch and a loud tone.

"Wow! wow! wow!" howled the little dog once more.

This time the lawyer stopped short, turned to the dog and eyed him severely.

"See here, Azor," he said aloud, "this can't go on. If you are arguing this case, you'd better do it alone; but if I am, then you've got to keep still!"

After that Azor held his peace.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Assignments**—Brokers.—Where a corporation employed two persons as brokers to purchase and sell land for it on specified terms, one of the brokers could not assign his interest in the contract to the other without the corporation's consent.—Lord v. Wapato Irr. Co., Wash., 142 Pac. 1172.

2. **Attachment**—Bond.—An attachment bond was properly executed in the individual name of plaintiff, who was the real party in interest, although he was doing busines under a tradename different from his individual name.—Wichman v. Fox, S. C., 82 S. E. 1014.

3. **Bankruptcy**—Attorney Fees.—While an appellate court may, in case of clear error, change the amount of an attorney's allowance made by the court in which the services were rendered, it will not do so unless the error is of the plainest.—In re Iron Clad Mfg. Co., U. S. C. C. A., 215 Fed. 877.

4.——Contempt.—A bankrupt cannot be punished as for civil contempt for failing to pay over money, alleged to have been withheld, to his trustee, where it clearly appears that at the time of the proceeding he was unable to comply with the order.—In re Stern, U. S. D. C., 215 Fed. 979.

5.——Contempt.—A court of bankruptcy has no legal power to endeavor to enforce an order to pay over money to a receiver or trustee by civil contempt proceedings resulting in a decree committing the contemnor to jail until he shall have complied with the original order, unless the evidence in the contempt proceedings clearly demonstrates a present ability and a willful refusal to obey.—Freed v. Central Trust Co. of Illinois, U. S. C. C. A., 215 Fed. 873.

6.——Fees.—It is the duty of every one connected with the administration of the bankruptcy laws to make sure that no fees or charges, except those intended by the acts of Congress, are paid out of the estate.—In re Metallic Specialty Mfg. Co., U. S. D. C., 215 Fed. 937.

7.——Partnership.—A bankruptcy court, neither under Bankruptcy Act, nor inde thereof, had authority, on a creditor's petition in bankruptcy proceedings against a firm, to secret partner without declaring him a bankrupt or finding him insolvent.—In re Samuels, U. S. C. C. A., 215 Fed. 845.

9.——Subrogation.—Owners of securities in the hands of bankrupts, who were brokers, which had been wrongfully pledged as collateral for a bank loan, and were sold by the bank, held subrogated to the bank's right of set-off with respect to a general balance to the credit of the bankrupts in their deposit account.—In re Leavitt & Grant, U. S. C. C. A., 215 Fed. 901.

10. **Banks and Banking**—Interest.—Where plaintiff gave defendant bank a certified check payable on a condition never performed, on defendant's refusal to return the check, plaintiff held entitled to recover interest from defendant from the time the check was charged to his account until it was returned.—Preston v. People's Savings Bank of Traverse City, Mich., 148 N. W. 772.

11.——Preference.—Plaintiff, which cashed checks drawn on defendant bank before the enactment of the Negotiable Instruments Law, held not entitled to a preference over other of defendant's creditors because drafts taken in payment of the checks were dishonored.—Lamro State Bank v. Farmers' State Bank of Winner, S. D., 148 N. W. 851.

12. **Brokers**—Release by Owner.—Where defendant had voluntarily, without the plaintiff broker's consent, released the purch of the purchaser to buy the property was not available as a defense.—Swift v. Moore, Ga., 82 S. E. 914.

13.——Sale by Owner.—When a real estate owner, who has given to a broker an agency to sell on commission, himself effects a sale to the broker's customer by an abatement of the price, the broker is entitled to his commission. —Davis-Fisher Co. v. Hall, Mich., 148 N. W. 713.

14. **Carriers of Goods**—Burden of Proof.—The burden was on the carrier to prove, not only that the act of God occasioned ultimately the loss of the shipment, but that the carrier's negligence did not contribute to it.—Charleston & W. C. Ry. Co. v. Nixon Grocery Co., Ga., 82 S. E. 893.

15.——Conversion.—The act of a carrier in failing without lawful excuse to deliver goods intrusted to his care constitutes both a breach of contract and a conversion, and the measure of the shipper's damages is the value of the property at the time of the conversion, with interest therafter.—Vanderbilt v. Ocean S. S. Co., U. S. C. C. A., 215 Fed. 886.

16.——Burden of Proof.—The burden was on a passenger to prove her contention that she was thrown from the platform by a "sudden, violent, unusual, and unnecessary jerk" of the train.—Georgia, F. & A. Ry. Co. v. Jacobs, Ga., 82 S. E. 934.

17——Limitation of Liability.—A carrier may, by reasonable regulations brought to the knowledge of a passenger, limit its liability as insurer in the transportation of baggage, except when paid additional compensation for the increased risk.—Zetler v. Tonopah & Goldfield R. Co., Nev., 143 Pac. 119.

18. **Chattel Mortgages**—Lien.—That the owner employing a firm to repair an engine had purchased same from a mortgagor, selling without written consent, did not preclude the firm's lien for repairs from being prior to the lien of the mortgage.—Reeves & Co. v. Russell, N. D., 148 N. W. 654.

19. **Common Law**—Revivor.—Where a statute declaratory of or changing the common law is repealed without express provision against revivor of the common law, the common law is thereby revived.—Reeves & Co. v. Russell, N. D., 148 N. W. 654.

20. **Contracts**—Discharge From.—As to the executory features of a contract with reference to specific property, the obligations assumed its continued existence.

one of the directors, who gets the money on plaintiff's check given by her to the corporation.—Chatfield v. Sintz-Wallin Co., Mich., 148 N. W. 797.

22.——Laches.—Where party to exchange of corporate stock with notice of fraud treated that received by her as her own until it became worthless, and the parties could not be placed in statu quo, held that the delay was unconscionable, and any right to rescind which she might have had was barred by gross laches. —Cazier v. Hart, Wis., 148 N. W. 860.

23.——Practical Construction.—A practical construction placed on an ambiguous contract by the contracting parties will ordinarily be adopted by the courts.—Wilhoit v. Stevenson, Neb., 148 N. W. 963.

24.——Profits.—Where defendant employed plaintiff to excavate rock within a reasonable time, and agreed that it should do as it pleased with the rock, defendant's cancellation of the contract for plaintiff's nonperformance within a reasonable time did not render defendant liable for loss of profits to plaintiff on rock not removed.—Smith Sand & Gravel Co. v. Corbin, Wash., 142 Pac. 1163.

25.——Public Policy.—Where a railroad about to build a line contracted with defendant for a right of way in consideration of giving him advance information as to stations, so that he might plat town sites and divide any profits with the railroad, held that such contract was against public policy and void.—Minnesota, D. & P. Ry. Co. v. Way, S. D., 148 N. W. 858.

26.——Waiver.—Where a person, after signing a contract and discovering that the other contracting party has failed to do so, declares his intention to proceed under it, he waives the failure to sign.—Serhant v. Gooch Milling & Elevator Co., Neb., 148 N. W. 911.

27. **Corporations**—Attorney Fees.—Where a stockholder, not directly injured or entitled to sue in his own primary right, successfully sues in a federal court in the primary of his corporation for relief for which the corporation should have sued, the court may allow his attorney full compensation out of any corporate funds in its hands or corporate property under its control in such suit.—Colley v. Sapp, Okla., 142 Pac. 1193.

28.——Foreign Corporation.—Where a foreign surety company collected the premiums on bonds executed prior to statehood and continued such bonds in force, it was "doing business" in the state, within Laws 1910-11, c. 26 § 2, providing for service on the Secretary of State.—Title Guaranty & Surety Co. v. Slinker, Okla., 143 Pac. 41.

29.——Notice.—All stokholders will be presumed to have had notice of a meeting at which a majority of the stockholders were present in person.—Bridges v. Southern Bell Telephone & Telegraph Co., Ga., 82 S. E. 925.

30. **Criminal Evidence**—Admissibility.—While ordinarily evidence of another offense cannot be given, yet whenever the case is such that the proof offered in support of the charge tends to prove the commission of another offense, such proof is admissible.—People v. Panagoit, Cal., 143 Pac. 70.

31.——Former Jeopardy.—The plea of former jeopardy will be sustained where the same testimony will support both charges.—Estep v. State, Okla., 143 Pac. 64.

32.——Impeachment.—A prejudicial violation of the rules governing the impeachment of witnesses by proofs of prior inconsistent statements is ground for reversal.—Dawson v. State, Neb., 148 N. W. 957.

33.——Pleading.—A plea of not guilty included the defense of insanity.—State v. Lemacks, S. Car., 82 S. E. 879.

34.——Venue.—A surveyor's testimony that he traced a line pointed out to him, by marks such as usually mark county lines, held sufficient to show the location of a county line to establish the venue of a homicide.—State v. Alderson, W. Va., 82 S. E. 1021.

35. **Damages**—Measure of.—The rule that all damages occasioned by the breach of a contract may be recovered is modified by the rules excluding damages not reasonably within the contemplation of the parties, and damages which are speculative, contingent, or remote.—Mankes v. Fishman, 149 N. Y. Supp. 228.

36.——Profits.—Loss of profits of an unestablished business are too uncertain to be recoverable as damages for breach of contract.—C. W. Kettering Mercantile Co. v. Sheppard, N. M., 142 Pac. 1128.

37.——Time of Essence.—Where a construction contract fixes an express date for completion, the parties may agree on liquidated damages to be paid in case of the contractor's failure to complete on time.—Early v. Tussing, Mich., 148 N. W. 678.

38. **Dedication**—Aceptance.—Acceptance of a property owner's express dedication of land for a street may be shown by any act recognizing the existence of the street as such.—Lastinger v. Town of Adel, Ga., 82 S. E. 884.

39. **Deeds**—Description.—A deed which describes land so that it could be identified by parol evidence in case of a controversy is not void for uncertainty.—Norwood v. Totten, N. C., 82 S. E. 951.

40. **Divorce**—Alimony.—Appellate courts possess inherent power to allow alimony, suit money, and attorney fees, such as the circumstonces warrant, pending an appeal in a divorce suit.—Taylor v. Taylor, N. M., 142 Pac. 1129.

41. **Ejectment**—Redemption.—A former owner who has deposited with the register in chancery the amount necessary to redeem from a tax sale may maintain ejectment without first securing a reconveyance of the land from the purchaser.—Closser v. McBride, Mich., 148 N. W. 756.

42. **Executors and Administrators**—Damages. —The damages recoverable in a personal injury case, revived after death of plaintiff in the name of his representative, are only such as were sustained by the injured person, and when recovered are assets of his estate, and are not for the benefit of the widow and heirs. —St. Louis & S. F. R. Co. v. Goode, Okla., 142 Pac. 1185.

43.——Tombstone.—An administrator may charge for a reasonable tombstone, depending on the value of the estate, as an administration expense.—Patterson v. Jones, S. C., 82 S. E. 1008.

44. **Exemptions**—Laborer.—Whether an employe is a laborer depends on whether his labor, considering the entire period of his employment contract, is principally physical or principally involves the exercise of mental faculties.—Georgia Ry. & Power Co. v. J. M. High Co., Ga., 82 S. E. 932.

45. **False Imprisonment**—Color of Process.— Where process proceeds from a body having authority to issue it is legal in form, and on its face contains nothing to apprise the officer serving it that it is issued without authority, it will protect him against liability.—Brown v. Hadwin, Mich., 148 N. W. 693.

46. **Forgery**—Completed Offense.—Since the false making or alteration of an instrument with intent to defraud is the gist of forgery, the offense is complete though no person be actually defrauded.—Commonwealth v. Segee, Mass., 106 N. E. 173.

47. **Frauds, Statute of**—Memorandum.—A memorandum order sent by the buyer's agent and accepted in writing held a sufficient memorandum of sale where it specified the price and the place of delivery.—McCaffrey Bros. Co. v. Hart-Williams Coal Co., Neb., 148 N. W. 966.

48.——Original Promise.—The question whether a verbal promise to repay borrowed money is original or collateral is ordinarily controlled by the intent of the parties as gathered from their conduct and relations to each other.— Waldock v. First Nat. Bank of Idabel, Okla., 143 Pac. 53.

49. **Gifts**—Deposit in Bank.—Deposit of money in bank with instructions that two children of the depositor were to have the money in case of her death, but that she was to have the interest, held a gift to the children and a delivery to the bank as trustee for them.— Boyle v. Dinsdale, Utah, 143 Pac. 136.

50. **Good Will**—Competition.—The agreement of the seller with the buyer of a business and its good will not to become a competitor passes, without formal written assignment, to one to whom the buyer sells the business and good will.—Public Opinion Pub. Co. v. Ransom, S. D., 148 N. W. 838.

51. **Guardian and Ward**—Bond.—An approved guardian's bond cannot be released, even by the court, without the consent of all parties in interest.—Commonwealth v. American Bonding Co., Pa., 91 Atl. 938.

52. **Highways**—Liability.—Where plaintiff was injured on a highway which was being repaired in part at state expense, the town under section 6 of the prior act was not liable for the damages sustained.—Town of Hanover v. Burroughs, U. S. C. C. A., 215 Fed. 817.

53. **Husband and Wife**—Post-Nuptial Agreement.—The validity of a post-nuptial agreement between a husband and wife dividing their property was not affected by any improper conduct of the wife subsequent to its execution, except in so far as such conduct served to explain or interpret her previous acts.—Krug v. Krug, Wash., 142 Pac. 1136.

54. **Indemnity**—Settlement.—Where plaintiff delivered freight to defendant for continued transportation, and it was injured by defendant's alleged negligence, plaintiff could settle with the shipper without suit, and recover over from defendant.—Pritchard v. Norfolk Southern Ry. Co., N. C., 82 S. E. 875.

55. **Infants**—Torts.—Where an infant sold plaintiff a horse and misrepresented his character, and plaintiff rescinded the contract and sued to recover the price, the infant could not escape liability for the tort on the theory that the matter arose ex contractu.—Patterson v. Kasper, Mich., 148 N. W. 690.

56.——Trespassers.—Children non sui juris, invading private property, are not willful trespassers, so as to charge them with negligence or personal responsibility.—Huggett v. Erb, Mich., 148 N. W. 805.

57. **Injunction**—Laches.—Where complainants sued to enforce a strict legal right by injunction, bare lapse of time less than the delay sufficient to defeat the right itself would not constitute laches.—Longton v. Stedman, Mich., 148 N. W. 738.

58. **Insane Persons**—Jurisdiction.—Where a person who has been adjudged incompetent has recovered, relief may be obtained only by application to the court which exercised original jurisdiction.—Chaloner v. Sherman, U. S. C. C. A., 215 Fed. 867.

59. **Insurance**—Blanket Policy.—A policy for "$5,000 on their unginned cotton while contained in six frame warehouses, * * * " without placing any specific amount on each warehouse, is a blanket policy.—Scottish Union & National Ins. Co. v. Moore Mill & Gin Co., Okla., 143 Pac. 12.

60.——Change of Occupation.—A change in the occupation of assured from a receiving clerk to foreman, classed as more hazardous, is not shewn by proof that assured, who performed the duties of his occupation, was accidentally killed while temporarily directing other men as to their duties.—Redmond v. United States Health & Accident Ins. Co., Neb., 148 N. W. 913.

61.——Dues.—Where the secretary of a fraternal benefit association, without the knowledge of the assured, reimbursed himself out of funds sent to pay dues, for dues previously advanced by him, the cancellation of the benefit certificate for nonpayment of dues was void.—Cunningham v. Modern Brotherhood of America, Neb., 148 N. W. 918.

62.——Indemnity Company.—Where defendant liability company appeared in court, after a loss, at the return of a writ, and conducted the defense, and gave plaintiff no notice that it intended to repudiate liability because a copy of the writ served on plaintiff was not sent to defendant immediately, as required by the policy, defendant was estopped to deny liability on that ground.—Wilson v. Frankfort Marine, Accident & Plate Glass Ins. Co., N. H., 91 Atl. 913.

63.——Leasehold.—Where plaintiff leased certain land with the right of occupancy and with a provision that any improvement at the end of the lease should revert to the owner of the property, and he had the right of occupancy of the entire premises, it constituted a leasehold interest which is insurable.—Home Ins. Co. of New York v. Coker, Okla., 142 Pac. 1195.

64. **Landlord and Tenant**—Repairs.—The lessor is not bound to keep the premises in tenantable repair, unless the lease requires him to do so.—Woodbury Co. v. Williams Tackaberry Co., Iowa, 148 N. W. 639.

65. **Larceny**—Recent Possession.—On trial for larceny of cow, the hide of which was found in defendant's possession, state held to have proved sufficiently defendant's possession of the cow, within Comp. Laws 1907, § 4355.—State v. Bowen, Utah, 143 Pac. 134.

66. **Libel and Slander**—Publication.—The sending of a letter containing an alleged libel by defendant to complainant's attorneys in reply to a claim the attorneys were making for complainant against defendant held a sufficient publication.—Brown v. Elm City Lumber Co., N. C., 82 S. E. 961.

67. **Master and Servant**—Assumption of Risk.—A servant does not asume the risk of injury from a hidden defect, such as defective underpinning beneath a floor.—Anderson v. Conway Lumber Co., S. C., 82 S. E. 984.

68.——Assumption of Risk.—In an action for the death of a mine employe from an explosion due to gas permitted to accumulate in a mine in violation of Rev. Laws 1910, § 3982, assumption of risk is not available as a defense.—Great Western Coal & Coke Co. v. Coffman, Okla., 143 Pac. 30.

69.——Assumption of Risk.—A master is liable for injuries from his negligent failure to furnish the servant a reasonably safe place in which to work and reasonably safe tools and appliances, unless the servant has assumed the risk or contributed to the negligence.—Producers' Oil Co. v. Eaton, Okla., 143 Pac. 9.

70.——Burden of Proof.—In an employee's action for injuries, the burden is upon the employer as to contributory negligence and assumption of risk.—McAtee v. Branning Mfg. Co., N. C., 82 S. E. 857.

71.——Contributory Negligence.—Decedent's knowledge of the danger confronting him at the time of his injury was an essential factor for the consideration of the jury in determining whether he was guilty of contributory negligence.—Great Western Coal & Coke Co. v. Cunningham, Okla., 143 Pac. 26.

72.——Fellow Servant.—That one of several employes has some little authority over the others does not prevent his being a fellow servant of them.—Poirer v. Bartlett Lumber Co., Mich., 148 N. W. 750.

73.——Fellow Servant.—In an action for death of a railroad employe engaged in interstate commerce, under the federal employers' liability act, the negligence of a fellow servant is no defense.—Caverhill v. Boston & M. R. R., N. H., 91 Atl. 917.

74.——Imputable Negligence.—Driver of moving van hired and paid by the owner of the van held not the servant of a party who had engaged the owner to move household goods, and driver's negligence, whereby such person was injured, was not imputable to him.—Adams v. Tozer, 149 N. Y. Supp. 163.

75.——Instruction to Servant.—Where a master employs workmen for simple tasks, he is not bound either to instruct the laborers or to inquire into their experience.—Jackson v. Schillinger Bros. Co., Mich., 148 N. W. 735.

76.——Non-Delegable Duty.—Where defendant's superintendent of construction directed the chipping of mechanical testers in defendant's assembling room without any precautions against flying chips, he failed to perform a nondelegable duty of defendant.—Webb v. Buick Motor Co., Mich., 148 N. W. 793.

77.——Pleading.—Declaration alleging that defects in boiler were unknown to plaintiff, and that he was in the exercise of due care and caution, held not demurrable as disclosing contributory negligence.—Eberts v. Mt. Clemens Sugar Co., Mich., 148 N. W. 810.

78.——Wrongful Discharge.—A traveling salesman discharged before the end of the month was not entitled to recover the salary and expenses for the month, where he secretly solicited business for a rival of defendant.—Mattingly v. Manhattan Oil Co., Neb., 148 N. W. 938.

79. **Mortgages**—Note.—Where a note was given without condition, and a mortgage alleged to have been made to secure the same did not correctly describe it, but stated that it was executed for and in consideration that plaintiff should defeat a divorce decree, plaintiff was entitled to recover on the note, independent of the mortgage.—Lovell v. Musselman, Wash., 142 Pac. 1143.

80.——Trustee.—An attorney for a creditor is not incompetent to act as trustee under a deed of trust securing a debt, but is bound to secure the best price possible, and if necessary, to invoke the aid of equity in doing so.—Copelan v. Sohn, W. Va., 82 S. E. 1016.

81. **Municipal Corporations**—Law of Road.—While one may drive on any part of a street, if he violates the law of the road, or an ordinance in that respect, he must exercise a higher degree of care than otherwise, and his failure to observe such law or ordinance, resulting in injury to another, is negligence per se.—Moy Quon v. M. Furuya Co., Wash., 143 Pac. 99.

82. **Navigable Waters**—Riparian Owners.—Grants by the United States of lands bordering on streams and other waters, without reservation or restriction, are to be construed as to their effect according to the law of the state in which the lands lie; the United States assuming the position of a private owner, subject to the general law of the state, so far as its conveyances are concerned.—Bernot v. Morrison, Wash., 143 Pac. 104.

83. **Negligence**—Invitation and License.—An invitation is to be inferred where there is a common interest or mutual advantage, while a license is to be inferred where the object is the mere pleasure or benefit of the person using it.—Midland Valley R. Co. v. Littlejohn, Okla., 143 Pac. 1.

84.——Manufacturer.—Where defendant rebuilt and sold to plaintiff's employer a die-cutting machine knowing that it would be operated by plaintiff's employes, defendant was bound to exercise reasonable care to make the machine safe, and was liable for injuries to plaintiff while operating the machine, caused by a failure to exercise such care.—Tom v. Nichols-Fifield Shoe Machinery Co., U. S. C. C. A., 215 Fed. 881.

85. **Parties**—Easement.—One who holds a parcel of land in trust may sue to protect an easement appurtenant to the land without joining the persons beneficially interested.—Hood v. New York Cent. & H. R. R. Co., 149 N. Y. Supp. 262.

86. **Principal and Agent**—Ratification.—That there may be a binding ratification by principals of their agent's unauthorized act, they must have full knowledge of the material facts.—C. E. Wise & Bro. v. Texas Co., N. C., 82 S. E. 974.

87.——Voluntary Agent.—Gratuitous payment, though on request, by a father of his son's debt, to which the father was a stranger, did not constitute a payment by the father as the son's agent.—Cunningham v. Irwin, Mich., 148 N. W. 786.

88. **Principal and Surety**—Recording Contract.—A surety, who completed a construction contract, is entitled to no lien for his work,

trespasser or licensee, to run a train at night without a headlight.—Griffin v. Atlantic Coast Line Ry. Co., N. C., 82 S. E. 973.

91. **Sales**—Conditional Sale.—Where a buyer refuses, on delivery of the building material bought, to execute notes secured by a conditional sale contract as agreed, the seller may recover his goods in trover.—Purdy v. Dunn Machinery Co., Ga., 82 S. E. 887.

92.——Inspection.—A buyer who accepted the goods after an examination of part of them is not estopped by his acceptance and payment from claiming damages occasioned by a defect which developed after the inspection.—Wolverine Spice Co. v. Fallas, Mich., 148 N. W. 701.

93.——Warranty.—Where fertilizer was sold for a tobacco crop under a statement that it was a high-grade fertilizer specially suitable, there was a warranty.—Tomlinson & Co. v. Morgan, N. C., 82 S. E. 953.

94.——Warranty.—For breach of warranty of automobile sold, buyer may recover, as special damages, expense of repairs made at the request of seller, to see if it could not be made to come up to the guaranty.—Underwood v. Coburn Motor Car Co., N. C., 82 S. E. 855.

95. **Vendor and Purchaser**—Burden of Proof.—A defendant, who still holds possession of land and relies on defect of title in an action for the purchase money, must show that the title accepted by him was positively bad, and that there was a superior and undisputable title in another person asserting the same.—Little v. Thropp, Pa., 91 Atl. 924.

96.——Election.—Damages from fraud do not operate as payment on the price until the vendee has elected that they shall be so applied.—International Realty & Securities Corporation v. Vanderpoel, Minn., 148 N. W. 895.

97.——Possession as Notice.—Possession of land is notice of the title or interest of the possessor and of those under whom the possessor claims.—Olmsted v. McCrory, Wis., 148 N. W. 871.

98.——Rescission.—A false representation as to the character, location, and value of land, when made under circumstances justifying the purchaser in relying thereon, is ground for rescission.—Rawlins v. Myers, Neb., 148 N. W. 915.

99. **Waters and Water Courses**—Riparian Owner.—That riparian proprietors contributed to the maintenance of a dam in specified proportions did not conclusively show that they were entitled to share in the use of the water to drive their machinery in the same proportion.—Lyon v. Piser, 149 N. Y. Supp. 197.

100. **Wills**—Attestation.—Execution of a properly witnessed will held sufficient, though testator signed by mark, on account of physical weakness.—In re Hersperger's Estate, Pa., 91 Atl. 942.

101.——Contingent Remainder.—Postponement of time of payment being for the single purpose of allowing the life-right holders to enjoy the estate does not make the remainder contingent.—Trenton Trust & Safe Deposit Co. v. Moore, N. J., 91 Atl. 908.

102.——Construction.—A fee simple, explicitly and with technical accuracy devised to H. on the sole condition that she survive the life tenants, held not made determinable, on her death without issue, by the succeeding clause.—Salter v. Philbrick, N. H., 91 Atl. 914.

103.——Deed.—Where a husband contributed money to erect a building on land owned by his wife on condition that the wife would devise the house and lot to him, her will made under such agreement, delivered to the husband, could

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OKLAHOMA'S SEPARATE COACH LAW.

In McCabe et al. v. Atchison, T. & S. F. R. R. Co., 35 Sup. Ct. 69, LXVII Chicago Legal News 145, the bill brought by several negroes against different railroads for unlawful discrimination by the latter in supplying only for whites, sleeping cars, dining cars and chair cars, was dismissed by the court, because it failed to state a case for the interposition of a court of equity.

What, however, was said by Mr. Justice Hughes, in *obiter* way, in the opinion, the other justices merely concurring in the result, is very interesting indeed, upon the question of the constitutional rights of the blacks being interfered with.

In answer to the contention by defendants that the cars as to which there was alleged discrimination that they were, "comparatively speaking, luxuries, and that it was competent for the legislature to take into consideration the limited demand for such accommodations by the one race, as compared with the demand on the part of the other," and that "the plaintiffs must show that their own travel (supposably travel by their race) is in such quantity and of such kind as to actually afford the roads the same profits, not per man, but per car, as does the white traffic, or sufficient profit to justify the furnishing of the facility, and that in such case they are not supplied with separate cars containing the same. This they have not attempted. What vexes the plaintiffs is the limited market value they offer for such accommodations. Defendants are not by law compelled to furnish chair cars, diners nor sleepers, except when the market offered reasonably demands the facility."

The learned Justice, speaking for himself, for, as said above, there was merely concurrence by the other justices in the result, which was dismissal of plaintiffs' bill, said:

"This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded."

This reasoning, if there is eliminated therefrom, what appears to us mere *ipse dixit* by the learned judge, seems to bring us to no definite point.

The opinion admits that these luxuries may be denied both whites and blacks, if the conditions of traffic do not justify their being supplied. In such case the particular individuals are ignored and they suffer because they belong to an aggregation not large enough, or traveling enough, to give to the carrier a profit for furnishing them.

It is also conceded the races may be classified so as to carry them in separate coaches. Why, if jointly the two classes may be lumped to ascertain whether the facilities may be demanded, may they not be regarded separately to ascertain by which or both the facilities may be demanded? No more in one case than in the other is the personal right regarded, but solely one's relative status to the population of which he is a part.

It may be true that each one has a personal right so far as discrimination is concerned, but that personal right has relation to the surroundings so far as its being demandable is concerned. It would be an absolute right, if the law did not provide for a reasonable classification wherein his claim to the right would fall.

We will suppose that provision is made for facilities of this kind to through passengers and not for local passengers, because the traffic would not pay a profit in doing so. Would a local passenger, who is put within a reasonable classification, have the right to claim discrimination? There is nothing against him as an individual, but only against him according to the circumstance of expense in supplying the facility. It is nothing to him that the carrier may furnish the through passenger what it is able to afford to furnish, but refuses to furnish him the same thing because at a loss. Neither he nor the carrier creates the condition. It inheres in the situation.

So when the negro is denied what the carrier may not supply him as one of a class except at a loss, where is there any personal right violated, constitutional though it be? One class, if reasonably defined, has no right to play, so to speak, the part of a dog in the manger, and say if my class cannot be accorded certain rights, neither shall another be accorded the rights, which it is equitable and right for a common carrier to furnish.

When the learned justice speaks of the negro being denied "a facility or convenience in the course of his journey, which under substantially the same circumstances is furnished to another traveler," this pronouncement gets us nowhere. If he is a member of a class to which the facilities cannot be furnished without loss, and another is a member of another class to which they may be furnished at a profit, the facilities are not denied under substantially similar circumstances as where they are granted.

As we said this part of the opinion seems not concurred in, because Justice Hughes' views on this question had nothing whatever to do with the result arrived at, in which the other justices do concur. Indeed, his views, if given any effect at all, are wholly opposed to the result which was reached.

NOTES OF IMPORTANT DECISIONS

PRINCIPAL AND AGENT—CONTRACTS BY LABOR UNION FOR THE BENEFIT OF ITS MEMBERS—Gulla v. Barton, 149 N. Y. Supp. 952, decided by Appellate Division of New York Supreme Court, appears to involve a variety of presumptions scarcely touched upon by the court in its opinion.

The facts show that plaintiff was working for defendant at a wage of $9.00 per week. While thus employed the labor union, of which he was a member, made a contract that all of the members should be employed at union wages at the rate of $18 per week. The object of defendant in agreeing to pay these wages was to prevent strikes and secure the use of the union label. These labels were furnished by the union and used by the defendant doing business as a union brewery. Plaintiff, apparently ignorant of the arrangement by the union, continued to work at $9 per week, and on ascertaining its existence, sued for the difference. There was judgment in defendant's favor, which was reversed by appellate division.

The court in division rules the case on the simple proposition that the contract was made for plaintiff's benefit and furthermore that the union in making it and supplying the consideration therefor, as plaintiff's agent, considered him embraced therein.

We think this case was rightly ruled above, independently of any presumption of knowledge or even of actual knowledge, by the plaintiff of the union's arrangement. We say this because the court intimates that had there been such knowledge there would arise a waiver. We think there would have to be consideration for such waiver. Plaintiff had a vested right in the contract made by the common agent of the members and this contract, though executory in nature, matured the right to demand all it called for, because in addition to the services rendered his agent continued to furnish and defendant continued to receive the consideration provided thereby. We do not, however, as does the New York court, regard this contract as one made for the benefit of a third person. If we did, we would rather think plaintiff acquired nothing thereby except a gratuity, which would be irrecoverable. But the principle of agency and the delivery and acceptance of benefits is amply sufficient for the judgment in plaintiff's favor.

SELF-DEFENSE—DUTY OF RETREAT BY ONE ASSAULTED IN HIS DWELLING.—Sir Edward Coke said: "A man's house is his castle et domus sua cuique tutissimum refugium," and Burke elaborated this idea in a burst of eloquence that is famous in literature. Third Institute of Coke, p. 162; Burke's Speech on Excise Bill. See also Lemayne's case, 5 Rep. 91. But does the principle apply when the owner of the house is assailed by one lawfully therein, so far as the duty of retreat is concerned? New York Court of Appeals holds that it does, two of the judges dissenting. People v. Tomlins, LII N. Y. Law Journal, 1249, decision rendered Dec. 18, 1914.

The principle of no duty to retreat when an owner is assailed has grown out of the perfervid aloquence of an elder English day and often has it been declared in cases where the owner is assailed from the outside, such owner defending himself on his own doorstep or from within. The New York court says: "The rule is the same whether the attack proceeds from some other occupant or from an intruder. It was so adjudged in Jones v. State, 76 Ala. 8, 14. 'Why,' it was there inquired, 'should one assailed by a partner or cotenant, any more than when assailed by a stranger who is unlawfully on the premises, flee? Whither shall he flee, and how far, and when may he be permitted to return?' "

This case assumes that because one may not be driven from his home by an assailant lawfully therein, so he has no duty to retreat to any position in his own home that may be open to him so as to avoid the necessity of killing his assailant. If assailant and assailed are in the home on equal terms and a sudden affray springs up, there is no case of a man being attacked in his own home in the sense of the principle at issue. Perhaps one cannot be made to retreat beyond the limits of his home, but why he may kill one there with equal right to be there as he, when he can avoid doing so is not clear. The principle is for the protection of the home against intruders and not for the protection of the owner of the home, when there is no intrusion. The owner's protection is derivative and not absolute.

CONSTITUTIONAL LAW—CHANGE OF DECISION BY STATE COURT AS IMPAIRING OBLIGATION OF CONTRACT.—The Supreme Court, after announcing other settled propositions, goes on to say: "It is equally well-settled that an impairment of the obligation of the contract within the meaning of the Federal

Cleveland & C. R. Co. v. City of Cleveland, 35 Sup. Ct. 21.

The court goes on to say that: "An examination of the record shows that the Federal right set up in court of common pleas and considered in the circuit court, the latter judgment being affirmed by the supreme court without opinion, concerned an alleged change of decision in the supreme court of Ohio, construing a statute concerning the contract upon which the railroad companies relied, the effect of which, it was alleged, would be to do violence to the contract clause of the Federal Constitution. It was not set up that subsequent legislation had impaired the obligation of the contract of the railroad companies. Therefore in the light of the decisions of this court above quoted, no federal right was alleged to have been impaired within the meaning of the constitution of the United States, and no such right was passed upon in the decisions of the courts."

Looking back to the cases referred to, we discover that the latter of them says:

"Courts of the United States are courts of independent jurisdiction, and when a question arises in a United States court as to the effect of a change in decision which detrimentally affects contract rights and obligations entered into before such change, such rights and obligations should be determined by the law as judicially determined at the time the rights accrued. In every such case the Federal courts, while leaning to the view of the state court as to the validity or interpretation of a law of the state, will exercise an independent judgment, and will not necessarily follow state judicial decisions rendered subsequently. Burgess v. Seligman, 107 U. S. 20, 33, 27 L. Ed. 359, 365, 2 Sup. Ct. Rep. 10; Loeb v. Columbia Twp., 179 U. S. 479, 493, 45 L. Ed. 285, 291, 21 Sup. Ct. Rep. 174."

Here is a reminder of all that court has said about "oscillation in decision" and change of decision being in effect an amendment of the old statute, and now we learn, that we have an independent court which will merely lean to the view of state courts in construction of their own statutes, where they oscillate. It makes one think that almost any reason is good enough for that court to refuse to follow the rule that a state court may construe the statutes of its state as to them appears right. In other words, this independent jurisdiction will sometimes apply that as state law which has

AN ANALYSIS OF THE LABOR SECTIONS OF THE CLAYTON ANTI-TRUST BILL.*

Congress has passed the Clayton Anti-Trust Bill, so-called, the President has signed it, and it has become a law. *In the shape in which it finally passed it makes few changes in existing laws relating to labor unions, injunctions and contempts of court, and those are of slight practical importance.*

First, it does not change in any respect the Sherman Anti-Trust Act, as it has been construed by the supreme court relative to those matters. Both the Senate and House Judiciary Committees, which reported the bill, so stated, and its provisions bear them out. The Senate Committee in its report said, "It is well, at the outset, to state the theory of the bill, both as it passed the House of Representatives and as it is proposed to be amended, for the general scope of the House measure is unchanged. It is not proposed by the bill or amendments to alter, amend or change in any respect the original Sherman Anti-Trust Act of July 2, 1890. The purpose is only to supplement that act and the other anti-trust acts referred to in section 1 of the bill." The Senate Committee also quoted from the report of the House Committee to the same effect as follows: "The bill does not interfere with the Sherman Anti-Trust Act at all; it leaves the law of conspiracy untouched, and it is not open to effective criticism on any constitutional ground."

Moreover, the bill in section 4 re-enacts, word for word, section 7 of the Sherman Anti-Trust Act, under which the Loewe case was brought to and decided by the Supreme Court, without excepting that or any other case from its provisions, which action, upon established principles of construction, is an adoption by Congress of tion, the right to injunctive relief against threatened loss from conduct of anyone in violation of that act, without excepting any case whatever. Read in the light of the foregoing, section 6 of the bill is nothing more than a legislative declaration of the law as it had been laid down by the Supreme Court in the case of Adair v. U. S. 208 U. S. 178, which was under consideration by the court along with the Loewe case and was decided just one week before it, to the effect that Congress, under its power to regulate commerce, ***had not*** prohibited and ***could not prohibit*** the existence of labor organizations as such. The court there said:

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employe's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have ***in itself*** and in the eye of the law any bearing upon the commerce with which the employe is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of their members as wage earners—*an object entirely legitimate* and to be commended rather than condemned. But surely those associations as labor organizations have nothing to do with interstate commerce as such. One who engages in the services of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. His fitness for the position in which he labors and his diligence in the discharge of his duties cannot in law or sound reason depend in any degree upon his being or not being a member of a labor organization.

organization who labors in the service of an interstate carrier."

The right of labor unions *as such* to exist, and the limitations on their lawful activities, are well defined in the case of Gompers v. Bucks Stove and Range Co., 221 U. S. 439, and section 6 of the Clayton Bill is but a declaration by Congress to the same effect, and is almost a paraphrase of it. The court in that case said:

> "Society itself is an organization and does not object to organizations for social, religious, business and all legal purposes. The law therefore recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence and power that comes from such association. By virtue of this right, powerful labor unions have been organized. But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the constitution, or by standing on such rights and appealing to the *preventive powers of a court of equity.* When such appeal is made, it is the *duty of government* to protect the one against the many as well as the many against the one.
>
> In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words 'unfair,' 'we don't patronize,' or similar expressions, a force not inhering in themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts' and as much subject to injunction as the use of *any other force* whereby property is unlawfully damaged. When the facts in such a case warrant it, a court having jurisdiction of the parties and subject matter has power to grant an injunction."

> "The labor of a human being is not a commodity or an article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

In this connection it is proper to refer to the legislative history of this section for its better understanding. For twenty-four years the labor unions had sought specific exemption from the provisions of the Sherman Anti-Trust Act by an amendment of it, stating that it should "not apply to" them, but had never succeeded. When the Clayton Bill was before the House several attempts were made to amend this section by inserting in lieu of the words "shall be construed to forbid the existence, etc., of labor unions, etc.," the words "shall apply to," but they were all defeated. This was but a repetition of what was thus described by the supreme court in the Loewe case. "The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, but that all these efforts failed, so that the act remained as we have it before us."

This section further declares that nothing in the anti-trust laws shall be construed to forbid or restrain the individual members of labor unions from *lawfully* carrying out the *legitimate objects* thereof. The legitimate objects of the labor union, of course, are the same as those of other people, the advancement of their own in-carrying out *unlawfully* either the legitimate or illegitimate objects thereof.

When does a labor union become an unlawful combination under the Sherman Act, and what are the means which it and its members are prohibited thereby from using? The answer is to be found in Eastern States R. L. D. Asso. v. United States, 234 U. S. 600:

"It broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce. * * * In Loewe v. Lawler, 208 U. S. 274, this court held that a combination to boycott the hats of a manufacturer and deter dealers from buying them in order to coerce the manufacturer to a particular course of action with reference to labor organizations, the effect of the combination being to compel third parties and strangers not to engage in a course of trade except upon conditions which the combination imposed, was within the Sherman Act. In Gompers v. Bucks Stove & Range Co., 218 U. S. 418, after citing Loewe v. Lawler, this court said (p. 438): *'but the principle announced by the court was general.* It (the Sherman Act) covered *any* illegal means by which interstate commerce is restrained, whether by unlawful combination of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, black-lists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter.'

"These principles are applicable to this situation. Here are wholesale dealers in large number engaged in interstate trade upon whom it is proposed to impose as a condition of carrying on that trade that they shall not sell in such manner that a local dealer may regard such sale as an infringement of his exclusive right to trade, upon pain of being reported as an unfair dealer to a large number of other retail dealers associated with the offended dealer, the purpose being to keep the wholesaler from dealing not only with the particular dealer who reports him, but with all others of the class who may be informed of his delinquencies. 'Section 1 of the act is not confined to voluntary restraint, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraint, as *where persons not so engaged* conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein.' U. S. v. Patten, 226 U. S. 541." * * * "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in Granada Lumber Co. v. Mississippi, 217 U. S. 433, 'when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished if the result is hurtful to the public or to the individual against whom the concerted action is directed.'

"When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress."

It is to be observed that the foregoing case demonstrates that the distinction between the primary and secondary boycotts has no place under the Sherman Act, for it was a case of what would be termed a primary boycott by those who claim to see something in that distinction at common law.

This section does not affect in any respect the liability of the members of such unions for the unlawful acts of their officers and agents, when within the scope of their authority, as the same has been established in the Loewe case. Nor does it change in any way the rules of evidence by which the unlawful nature of such combinations is established. The same remain as laid down as follows by the supreme court in the Retail Lumber Dealers' case above cited.

> "But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done; and when, in this case, by concerted action the names of wholesalers who are reported as having made sales to consumers *were periodically reported* to the other members of the association the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred."

Nor does this section sanction the existence of, or remove from the condemnation of the civil and criminal provisions of the Sherman Act, or justify or excuse a conscientious Department of Justice in neglecting to proceed against such a combination as the American Federation of Labor, whose constitution provides for the declaration of boycotts, and establishes a vast machine for their prosecution in interstate commerce, and directs its Executive Council to secure the unification of all labor organizations so far as to assist each other in making the same effective, and whose principles and methods are thus accurately described in the following report unanimously adopted by its Convention of 1905.

> "We must recognize the fact that a boycott means war, and to successfully carry on a war, we must adopt the tactics that history has shown are most successful in war. The greatest master of war has said that war was the trade of a barbarian, and the secret of success was to concentrate all your forces upon one point of the enemy, the weakest if possible. In view of these facts, the committee recommends that the State Federations and Central bodies lay aside minor grievances and concentrate their efforts and energies upon the least number of unfair parties or places in their jurisdiction. One would be preferable. If every available means at the command of the State Federations and Central bodies were concentrated upon one such, and kept up until successful, the next on the list would be more readily brought to terms and within a reasonable time none opposed to 'fair' wages, conditions or hours, but would be brought to see the error of their ways and submit to the inevitable."

The Sherman Anti-Trust Act, having been enacted under the constitutional power of Congress to regulate commerce among the states, is, of course, the supreme law of the land, in all cases within its purview, in every state, territory and district, and judges of every court, federal and state, are bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding. *Since there is nothing in the Clayton Bill which limits in any way the restraints of that act upon the unlawful acts of labor unions, or their members, and since it goes still further and specifically grants to any person threatened with irreparable injury from acts forbidden by that Act injunctive relief, the protection of the individual, whether employer or employe, instead of being impaired, is greatly increased by it.*

Second. Let us turn next to sections 17, 18, 19 and 20 of the bill, which deal with the subject of the issuance of restraining orders and injunctions by federal courts.

There is nothing in the first three of those sections which would justify any extended comment here. They make no material changes in existing law and practice. Such small changes as are made are in provisions which are merely directory, not mandatory, and which the courts will construe as having been intended by Congress to promote the administration of justice, not to impede it, and to secure the rights of all parties.

There is, however, one thing about these sections which is most noticeable, and that is the total repudiation therein by Congress of the contention made before its committees, for the last twenty years, in behalf of the labor unions, that the federal courts have no power to enjoin the commission of acts which are crimes, and their equally persistent contention, that the issuance of injunctions by the federal courts to protect any right except property or a property right, defined by them so as to exclude from its meaning the *right to do business,* the *right to work,* to *buy and sell labor,* or to *seek and obtain employment,* is a usurpation by those courts which they called upon Congress to forbid. The whole scheme of the Trades Commission Bill, and of most of the Clayton Bill, is framed in complete negation of the doctrine that Courts of Equity cannot issue injunctions except to protect property or property rights so defined, or that they cannot enjoin the commission of acts which are also crimes. *Indeed, what has been so long denounced as "Government by Injunction" has been enormously extended by these two bills. And sections 21 and 22 of the Clayton bill (to be hereafter discussed) specially provide for the enforcement of injunctions issued to forbid acts which are crimes, by penalties of unexampled severity.*

Labor's Bill of Rights—But section 20 of the Clayton Bill calls for special remark, for it is said to be that section which constitutes "Labor's Bill of Rights." It singles out for special treatment from the vast field of cases over which, by the Constitution and laws of the United States, the federal courts have jurisdiction, those only which are between *employers* and *employes* or between *employes,* or between persons *employed* and *persons seeking employment* where *such relations actually exist* at the time suit is brought and an injunction is applied for, which suits involve or grow out of disputes concerning terms and conditions of employment.

Suits between parties, who previously sustained those relations, but have ended them, and suits between either of said parties and outsiders, are not covered by this section. Suits between an employer and his ex-employes who have struck, and boycott cases generally, are excluded from this section. Apparently, also, the class of cases to which the section relates is still further limited by being confined to suits between the specified parties brought to prevent irreparable injury to *tangible property or property rights,* because the application for an injunction in the specified cases must describe *"with particularity"* the property or property right to be protected by the injunction. But whether this last limitation on the class is intended or not, it is clear that suits to protect other rights between such specified parties, and suits between either of such parties and outsiders to protect property, or other rights, and suits between parties who have previously sustained the relations specified but have terminated them, are not included in the prohibition against the issuance of injunctions addressed to the federal courts in this section. The legislative history of this section shows that these exemptions were intentionally made.

And in the very limited class of cases to which the prohibitions of the section are confined by its terms, what are the acts which the federal courts are prohibited by this section from enjoining? They are *any* acts or acts which might *lawfully* be done *in the absence of such dispute, including* the *lawful* termination of the relation of employment, the *lawful* recommending, advising or persuading others by peaceful means to terminate employment, the *lawful* attending at any place where it is lawful to be, for the purpose of peacefully obtaining or communicating information, the *lawful* peaceful persuasion of any person to work or to abstain from working, the *lawful* ceasing to patronize or employ any party to such dispute and the *lawful* recommending, advising or persuading others by peaceful and lawful means so to do, the *lawful* paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value, and the *lawful* assembling in a peaceable and lawful manner. It is these acts which the federal courts are forbidden to enjoin in the limited classes of cases specified in this section, and which "shall not be considered or held to be violations of any *law of the United States.*"

Since the injunctive power of the federal courts of equity has always been limited to the prevention of irreparable injury from *unlawful* acts, it will be at once seen that this section does not change in the least the existing law, that it is merely a legislative construction of the law as already declared by the courts, and that "labor's rights" like those of everybody else, are secured to it, not by this section, but by the federal and state constitutions and laws of long standing, passed in pursuance of both. The section merely provides, that in the specific suits between the parties named acts which would be lawful when no "dispute concerning terms and conditions of employment" existed between them, shall not be enjoined or considered or held to be violations of any law of the United States.

That this is what the section means is shown by the history of the times, to which the courts will look in construing it. It was passed by a Democratic Congress in literal performance of the following platform pledge of the Democratic Party in 1908 and repeated verbatim in 1912:

> "Questions of judicial practice have arisen, especially in connection with industrial disputes. We believe that the parties to *all* judicial proceedings should be treated with *rigid impartiality,* and that injunctions should not issue in any cases in which injunctions would not issue *if no industrial dispute were involved.*"

This declaration, it is well known, was inspired and perhaps was drawn by Mr. Gompers, who has never ceased for the past ten years to assert before committees of Congress, and in public addresses everywhere, and in the magazine of which

true, and perhaps had come to believe it himself.

That this is the meaning of the section is also shown by its legislative history. The reports of the committees, and even the debates in Congress, show that there was no intention of legalizing anything which was then illegal, but only to legislatively declare what was then legal. That the several acts specified in this section might be unlawful under certain circumstances was not denied, and the principles laid down by the Supreme Court in Aiken v. Wisconsin 195 U. S. 194 were recognized:

> "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if a step in a criminal plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

That this is the meaning of the section is also shown by the fact that, if it had been the intention of Congress *thereby* to amend the existing statutes of the United States, it would have repealed thereby *the Civil Service laws,* prohibiting the discharge, without cause, of the 200,000 employes in the various departments of the government, ***the most vital provisions of the Interstate Commerce Act,*** both as to the ***carriers*** and their ***employes*** in doing the work imposed upon them by it, under severe penalties, and ***the Sherman Anti-Trust Act,*** both as to employers and employes, which act the committees declared that they had left unchanged by the Clayton Bill.

That this is the meaning of the section is further shown by the fact, that any other construction of it would render it plainly unconstitutional, and the courts, in construing it, will not assume that it was the intention of Congress to pass laws that are ceeds $5,000 in amount, arising under the laws of the United States, and of controversies between citizens of different states, of like amount. And the fifth amendment of the federal constitution expressly declares that no person shall be deprived of his property without due process of law. Under the constitution and laws of the United States the citizens, who are parties to the several suits mentioned in this section, have the inalienable right to resort to the federal courts of equity for protection of their property, when assailed by any or all of the acts specifically enumerated therein, since, by such acts, such courts have heretofore uniformly held, that property and property rights may be unlawfully injured and destroyed. Congress could not, by a legislative fiat declaring that the injurious acts destructive of property were not unlawful, deprive them of their property. It would violate the 5th amendment of the federal constitution. Such a construction would also render the section invalid, because it would invade the judicial power of the federal courts of equity, which the constitution declares shall extend to all cases and controversies over which, by the statutes of their creation, they are given jurisdiction. For a statute to say that a court shall have equitable jurisdiction over a certain case or controversy, and then for another statute to deny it the power to judicially construe *previously existing statutes,* and also the fundamental essential power to issue and enforce the usual and necessary process required by its jurisdiction, would be a direct invasion by Congress of the judicial department of the government and totally void.

It would require a treatise to fully elucidate all this, but I have already extended within such a narrow compass that it is difficult to conceive of a case to which they will apply. They are in terms expressly limited to instances of disobedience by a person, not in the presence of the court, *or so near thereto* as to obstruct the administration of justice, of some *lawful* writ, process, order, rule, decree or command of a federal district court or of *any* court of the District of Columbia, not entered in a suit brought or prosecuted by or in behalf of the United States, which order, etc., *forbids him* to do any act or thing which is of such a character, *if done by him,* as would constitute also a criminal offense under any statute of the United States, or under the laws of the state where committed. Every other act of contempt than this one, so specified, is expressly, specifically and in terms excepted from the regulations prescribed. Since the supreme court has held that every act of disobedience of an order, *wherever committed,* which obstructs the administration of justice in a court, is committed *"so near thereto* as to obstruct the administration of justice," that it is the *disobedience* which obstructs, and that *the place* where it occurs is unimportant, whether nearby or 1,500 miles away, and legally cuts no figure, it would seem that the very exceptions made cut out from the regulations prescribed every case of contempt which their terms cover.

But assuming that there may hereafter arise some act of disobedience which does fall within the regulations of these sections, what changes, if any, do they make in the existing law and practice relating to the trial and punishment of it as a contempt? None whatever when such contempt occurs in any suit, not "within the purview of this act," which, by the other provisions of *may* be by the court or upon demand of the accused, by a jury; in which latter event the court *may* impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers *may* cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place, at which time a jury *shall* be selected and impaneled as upon a trial for a misdemeanor; and such trial *shall* conform, *as near as may be* to the *practice* in criminal cases prosecuted by indictment or upon information.

An attentive consideration of these various provisions will show that the decision whether the trial is to be by the court or jury is left within the discretion of the court, as it always has been, and that the proceedings at the trial, if a jury trial is had, will not differ from those heretofore pursued, and which are well shown in the case of In re Steiner, 195 Fed. 303, in which Judge Lacombe made the following order:

> "The cause will be taken up for a hearing on Monday, May 27, at 10:30 a. m. As there may be conflicting testimony which will present a *question of fact* as to what was or was not done, there will be a jury in attendance to whom *may* be submitted such concrete questions of fact as may at the time seem desirable. This does not mean that the whole case will be tried by the jury. The trial is one for the court, but the court is willing to have a jury decide which of two or more opposing witnesses is truthfully stating the fact."

That the provisions of these sections in regard to a jury trial are *permissive* and not mandatory is shown by the history of the times. They were passed by a Democratic Congress in pursuance of a party pledge made in 1908 and repeated in 1912 as follows:

> "We reiterate the pledge of our National platforms of 1896 and 1904 in favor of *the measure,* which passed the United States Senate in 1896, but which a Republican Congress has ever since refused to pass, relating to contempts in Federal courts and providing for trial by jury in cases of indirect contempt."

"The measure" here referred to was the bill unanimously reported on May 4th, 1896, by the Senate Judiciary Committee, through Senator David B. Hill, which contained the following provision; as to the trial of *all cases* of indirect contempt:

> "But such trial *shall* be by the court, *or in its discretion* upon application of the accused a trial by jury *may* be had as in any criminal case."

This measure, as thus reported, passed the Senate on June 10th, 1896, in the closing hours of the session when there were only a few Senators present and in the midst of the hurry and confusion usual at such a time, but with an amendment thereto forced into it by two Senators, not members of the committee and not Democrats, striking out the words "in its discretion" and the word "may" and inserting in place of it the word "shall." This amendment was not considered to be a part of "the measure" which the Democratic convention approved of. For the provision as reported by the Senate Committee the Democratic party has since always stood, and on May 28th, 1900, when the Alaska Civil Code was pending before the House of Representatives, the Democratic Party in Congress offered "the measure" as a whole as an amendment, with this provision in it, as reported by the Senate Judiciary Committee as covering the whole subject of the trial of all cases of contempt, and failing in this, actually forced the above quoted provision that the trial "shall be by the court, or in its discretion, upon application of the accused, a trial by jury may be had as in any criminal case," into section 612 of the Code.

When the Democratic party finally got control of the lower house of Congress in 1911, the majority prepared and passed a bill regulating contempt proceedings, which failed in the Senate. The Judiciary Committee which had charge of the matter, had before it eleven bills relating to that matter, every one of which contained the positive requirement that in all cases of indirect contempt "a trial by jury *shall* be had as in criminal cases." One of these bills was introduced by Mr. Clayton himself at the instance of the labor unions, whose counsel had prepared it. Moreover, during this entire period, innumerable bills to secure trials by jury in cases of indirect contempt had been introduced, at the instance of the labor unions, in the legislatures of nearly all the states, some of which were actually put upon the statute books in a few states, and every one of these bills use the imperative word "shall" instead of the word "may" in the provision for the trial by jury in such cases. All of this was well known to the Senate and House Committee, it having been brought to their attention by the opponents of such legislation.

When the Democratic majority prepared and reported its bill in 1912, it deliberately rejected the word "shall" contained in the bills which had been before it, and in all other bills which had ever been drawn to make a *trial by jury compulsory,* and inserted in lieu of it the permissive word "may."

Moreover, during this entire period the Supreme Court of the United States and the supreme courts of many states were rendering decision after decision to the effect that the requirement of a trial by jury in such cases would not only be destructive of the independence of the judiciary, and of its power to protect itself from insults and to secure obedience of its orders, but also that, to say the least, it would be of very doubtful constitutionality, because invasive of the independence of the judiciary.

The supreme court, in construing these sections, will assume that Congress intelligently made this change, and particularly that it heeded its suggestions, in this respect, so often made in its decisions, for the purpose of avoiding such doubts as to their constitutionality and a conflict with that court.

This principle of construction was adopted by the supreme court in Lincoln v. U. S., 202 U. S. 498, in which it said:

> "Moreover, the Act of July, 1902, was passed with full knowledge and after careful consideration of the decisions of this court, and Congress was aware that grave doubts, at least, had been thrown upon its power to ratify a tax under circumstances like the present. De Lima v. Bidwell, 182 U. S. 199, 200. This affords a *special* reason for believing that if it had intended to encounter the limitations of that case, it would have done so *in clear words from which there was no escape.*"

Now, as early as May, 1895, just one year before Senator Hill reported from the Judiciary Committee the bill which it had so carefully considered, the supreme court in the Debs case, 158 U. S. 594, which decision was before the committee had said this:

> "The power of the court to make an order carries with it the equal power to punish for a disobedience of that order, and inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

This decision was followed at intervals by numerous decisions of that court to the same effect until in May, 1911, it decided the case of Gompers v. Bucks Stove & Range Co., 221 U. S. 450, in which it specifically laid down the law as follows:

> "The power of the courts to punish for contempt is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed upon them by law. Without it they are mere boards of arbitra-

tion, whose judgments and decrees would be only advisory. If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery. This power 'has been uniformly held to be necessary to the protection of the court from insults and oppressions, while in the ordinary exercise of its duties and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors, Bessette v. Conkey, 194 U. S. 324, 337. There has been general recognition of the fact that the courts are clothed with this power and must be authorized to exercise it without referring the issues of fact or law to another tribunal, or to a jury in the same tribunal. For if there was no such authority in the first instance, there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently, the courts could not administer public justice or enforce the rights of private litigants. Bessette v. Conkey, 194 U. S. 337. Congress, in recognition of the necessity of the case, has also declared (Rev. Stat. 725) that the courts of the United States 'shall have power to punish by fine or imprisonment contempts of their authority, including disobedience to any lawful order of the said courts.' "

It is not probable that the authors of these sections, with all this before them, used the word "may" as equivalent of the word "shall," or that they intended to make trial by jury in contempt cases compulsory in any instance. Moreover, that they gave full heed to the suggestions of the court and appreciated the folly of disregarding them is shown by the provisions of Section 24, by which they limited even the provisions which permitted such trials by jury

"Sec. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or *so near thereto as to obstruct the administration of justice,* nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name of, or in behalf of, *the United States,* but the same, and all other cases of contempt not specifically embraced within Section 21 of this Act, may be punished in conformity to the usages at law and in equity now prevailing."

Many other considerations could be adduced, drawn from the interpretation of such language by the Supreme Court and by other courts in contempt and other cases, and from the use of other expressions in these sections, such as this, "such trials shall conform *as near as may be* to the practice in criminal cases," which the Supreme Court has held to mean that *the matter to which they apply* is left within the discretion of the court, but enough has been said, I think, to satisfy anyone that the existing law as to the mode of trial is unchanged by these sections of the bill.

There is, however, in these sections, a provision which does change the existing law, and greatly increases the severity of the punishment which may be inflicted upon those who violate the injunctions of the courts in the cases to which these sections are supposed to apply. Under section 22, the court is at liberty to imprison the accused for a period of six months, and *also* to fine him $1,000, payable to the United States, and to *further* fine him, in amounts equal to the damage which his contempt has caused to the complainant or *any other party,* and to order that he stand committed until such fines are paid. This is an enormous extension of the power of the federal courts in contempt cases of this char-

CHATTEL MORTGAGE—AFTER ACQUIRED PROPERTY.

WILLIAMS v. NOYES & NUTTER MFG. CO.

Supreme Judicial Court of Maine. Dec. 5, 1914.

92 Atl. 482.

Under a chattel mortgage providing that the mortgagor might sell in the ordinary course of business, replacing the stock with new stock and keeping it to its present value, and that it covered all after-acquired property added to the business in any manner or during the existence of the mortgage, the mortgagee did not rely or intend to rely upon the agreement to sell from the stock and replace it with new stock, and, in view of what interested third parties might ascertain from inspection of the mortgage, he could take only such goods as he showed title to, which were in existence at the date of the mortgage or substituted for articles sold by purchase from the proceeds.

HANSON, J. Action of trover brought by the plaintiff, as trustee in bankruptcy of the estate of Alton G. Crockett, reported to this court for determination of the rights of the parties.

On September 10, 1910, Alton G. Crockett mortgaged his stock of goods, fixtures, and accounts to the defendant to secure an indebtness of $759.18. The value of the mortgaged property was then about $500. The mortgage contained the following provision as to after-acquired merchandise:

"It is understood that the said Crockett is to have the right to sell at retail in the ordinary course of business from said stock, replacing the same with new stock and additions from time to time, keeping the stock to its present value and insured for the benefit of the said mortgagee; and the said Crockett hereby sells and conveys to the said Noyes & Nutter Mfg. Co. all and singular all additions to merchandise, metals and stock, or accounts hereafter due for labor or material; and the same to be the property of the said Noyes & Nutter Mfg. Co., their successors or assigns. It being distinctly understood that this mortgage and conveyance covers all after-acquired property, added to said business in any manner after the date of this mortgage or during the existence of said mortgage, to Noyes & Nutter Mfg. Co. To have and to hold all and singular the said goods and chattels, property rights and interests to the said Noyes & Nutter Mfg. Co., their successors and assigns."

The parties continued their business relations until July 7, 1913, when Mr. Crockett was adjudicated a bankrupt. He then owed the defendant $1,229.69. The plaintiff was appointed trustee, qualified as such officer, and thereupon took possession of the merchandise in question. The inventory filed amounted to $921.28, which was later increased by sales from the stock not reported, aggregating $82.34, making $1,003.62 as the value of the bankrupt estate. The mortgage was not foreclosed, and the bankrupt was in possession of the property at the date of adjudication, and delivered the same to the trustee.

The defendant by its attorney, made demand upon the trustee for the goods, and, upon refusal, took the same forcibly from the plaintiff, and sold them.

Among the admissions and agreements made by counsel, two only are material:

(1) "That, in case judgment shall be rendered for the plaintiff, the damages shall be for the sum for which the defendant sold the goods, to wit, $460.64."

(2) "While the mortgage never has been foreclosed, the plaintiff waives that omission."

The plaintiff contends that: (1) "The mortgage is void because it was executed under duress." (2) "The terms of the mortgage are not sufficient to hold the property acquired subsequent to the execution of the mortgage; the trustee having taken possession thereof before the mortgagee, and Mr. Crockett having been adjudicated bankrupt." (3) The trustee's title is superior to that of the mortgagee, and the property passes to him for the benefit of the creditors of the bankrupt estate.

The defendant contends: (1) That there was no duress. (2) That, while this mortgage does not say in terms that new goods shall be bought with the proceeds from the sale of old, it is the plain intent of the parties and the necessary construction, because it says that Crockett had the right to sell from the stock, replacing the same with new stock, keeping the stock up to its present value, and cites Bell v. Jordan, 102 Me. 67, 65 Atl. 759, and Union Water Power Co. v. Lewiston, 95 Me. 171, 49 Atl. 878, as supporting its contention "that, in the construction of contracts, there is one fundamental rule or consideration, which is paramount to all others, and that is that the intention of the parties as gathered from the language of all parts of the agreement, considered in relation to each other, and interpreted with reference to the situation of the parties, and the manifest object which they had in view, must always be allowed to prevail, unless some established principle of law or sound public policy would thereby be violated;"

and further that "it is the manifest object of the parties in making this mortgage that the stock of goods should be kept up to its present value, and the only possible way to do it lawfully and properly would be to use the proceeds of the sale for that purpose;" and that the mortgage under consideration "does not differ from the ordinary mortgage of this kind where authority to sell is given to the mortgagor, and he covenants to use the proceeds thereof to purchase new goods of like kind, and to keep the stock up to a given value." (3) That the title to the goods was in the defendant, who had lawful right to possession of the same, as between the parties, and as against any third party who has not acquired superior equities by attachment or otherwise and the taking of possession. In effect defendant claims that the plaintiff, as trustee, acquired no right to possession of the goods, and that the burden of proving the kind, quality, and amount of goods in stock, and whether old or acquired after the date of the mortgage, is upon the plaintiff; that failing to do this, and for the further reason that the old and new goods were intermingled in such a manner as to render division impossible, the plaintiff cannot recover.

[, 2] The plaintiff's first contention is not supported by the evidence. The record discloses an attempt on the part of the defendant's agent to get security for a running account. Two demands for payment, at least, had been made by the defendant. The direct testimony on this point follows:

"Q. And what did Mr. Nutter tell you in regard to signing the mortgage? A. He was prepared to close me up unless I did sign the mortgage."

The cross-examination brings out general statements of "threats," but the words used appear to have been the same in substance as given in direct examination. We are unable to find that there was duress. The defendant went about the business in the usual way, employing language expressing his intention to sue and attach if security was not given. The bankrupt elected to make a mortgage, and for about three years thereafter carried on his business with the mortgage on his stock. The time involved negatives the claim of fraud or duress, and serves as a waiver of any right to now set up either claim.

[3, 4] While at common law a mortgage of chattels not then in existence was invalid (Abbott v. Goodwin, 20 Me. 408; Head v. Goodwin, 37 Me. 181; Morrill v. Noyes, 56 Me. 458, 96 Am. Dec. 486), it has now become a settled principle in this state that a person may mortgage after-acquired property (Abbott v. Goodwin, supra, and cases cited); and, as between the parties, a mortgage upon goods, which authorizes the mortgagor to sell them, and with the proceeds of such sale to purchase other goods to take their place, will be upheld (Allen v. Goodnow, 71 Me. 420; Deering v. Cobb, 74 Me. 332, 334, 43 Am. Rep. 596). Something more than the authority given in the mortgage under consideration, or the actual acquiring of the new property, is necessary, where the rights of third parties intervene, as in the case at bar. Where the power sought to be created is ineffectual, the mortagee must be in actual possession of the property mortgaged, if he would defeat the claims of other creditors. Such mortgage, to have the effect contended for by the defendant, must contain apt words to designate the power to sell from the stock so mortgaged, and the further stipulation that the proceeds of such sale shall be applied to the purchase of new articles of like kind to those sold; the chattels so purchased to become substituted for those sold at the instance and under the authority of the mortgagee, so that the legal title to them may be said to pass to the mortgagee as effectually as if he had himself made the sale, by assent of the mortgagor, and with his own hand replenished the res. The mortgagor, by so doing, simply executes a power, performs a trust created by the mortgage, and thereby neither depletes the security nor defrauds his other creditors. Abbott v. Goodwin, 20 Me. 408; Sawyer v. Long, 86 Me. 541, 30 Atl. 111.

(5) It is not contended that the mortgage meets the requirements of the decided cases upon this element of the case at bar, but counsel urges that the mortgage should be so construed, as that is the plain intent of the parties and necessary construction, because it says that Crockett had the right to sell from the stock, replacing the same with new stock, keeping the stock up to its present value, and relies upon the doctrine of Bell v. Jordan, 102 Me. 67, 65 Atl. 759, and Union Water Power Co. v. Lewiston, 95 Me. 171, 49 Atl. 878,

to the situation of the parties, and the manifest object they had in view, must always be allowed to prevail, unless some established principle of law, or sound public policy, would thereby be violated, is peculiarly applicable in the case at bar.

As bearing upon the intention of the parties, a reading of the last clause of the stipulation under consideration demonstrates that the defendant did not rely or intend to rely upon the agreement to "sell from the stock, replacing the same with new stock," but went far beyond the purport of such stipulation even, and caused his mortgage to include these words:

"It being distinctly understood that this mortgage and conveyance covers all after-acquired property, added to said business in any manner after the date of this mortgage, or during the existence of said mortgage to Noyes & Nutter Mfg. Co., their successors and assigns."

In view of the many decisions of this court sustaining a mortgage of after-acquired property when such mortgage is properly drawn, when the rights of the parties, and particularly the rights of interested third parties, may be definitely known from inspection of the mortgage, or a record thereof, we hold that the defendant, in any event, could take under his mortgage only such goods or fixtures as he has shown title to, which were in existence at the date of the mortgage, and those substituted for articles sold by purchase from the proceeds of sales from such mortgaged stock. To hold otherwise would be "a violation of an established principle of law and sound public policy." Sawyer v. Long, supra; Allen v. Goodnow, 71 Me. 420; Deering v. Cobb, 74 Me. 332, 43 Am. Rep. 596; Williamson v. Nealey, 81 Me. 447, 17 Atl. 404; Dexter v. Curtis, 91 Me. 505, 40 Atl. 549, 64 Am. St. Rep. 266.

The trustee in bankruptcy had taken possession of the bankrupt's stock from the bankrupt. The defendant dispossessed the trustee. Had he that right?

(6-8) Where once the trustee is appointed, his title to the bankrupt's estate relates back to the date of the adjudication. 5 Cyc. 342. A trustee takes the property of the estate subject to all equities, liens, and incumbrances existing against it in the hands of the bankrupt. The plaintiff having taken possession 424, two actions of replevin to recover possession of certain store fixtures which were in a bankrupt's possession at the time of his adjudication in bankruptcy, it was held that when a court, state or federal, has once taken into its possession a specific thing, no court, except one having supervisory control or superior jurisdiction in the premises, has a right to interfere with or change that possession. Jones on Mortgages (6th Ed.) 1231, 1232; Carney v. Averill, 110 Me. 172, 85 Atl. 494. See Chase v. Denny, 130 Mass. 566; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183.

(9) The case shows that the defendant's interest in the stock could not exceed $500, one of the conditions being that the mortgagor shall keep the stock to its present value, and the value of the stock when mortgaged did not exceed $500. He took from the plaintiff goods of the value of $1,003.62, and disposed of them. Aside from the question of amount of the original stock remaining and goods replaced, the defendant must account to the trustee for the excess in his hands over $500, which amount is greater than the judgment agreed upon.

(10) But the plaintiff may recover upon other grounds. The trustee was an officer of the law. He had possession of the goods, and his possession was the possession of the law. The defendant's right to follow the property, if it ever existed, was suspended on the appointment of the trustee. The trustee had acquired superior rights by virtue of his office. The defendant, not having possession of the goods, and having no right to possession as against the trustee, had the burden of showing title to the goods claimed by it under the mortgage, viz., such goods as were in existence at the date of the mortgage, and the goods, if any, substituted for articles sold by purchase from the proceeds of sales. It did not attempt to show either. It could not hold after-acquired goods because it did not have possession before the adjudication in bankruptcy. As to original goods on hand at the date of the mortgage, if any, the record is silent, and the trustee, who otherwise might have been able to determine the rights of all parties, was deprived of the only means of accomplishing that end by the act of the defendant in removing the goods and placing them beyond the reach of

The case discloses that the bankrupt's business amounted to about $5,000 per year; that much of his stock was purchased upon credit from others than the defendant, and some goods were paid for in cash; that, of the stock at the date of the bankruptcy proceedings, one-third had been received from the defendant and two-thirds from other sources—the latter purchased largely upon credit, and not from sales from the mortgaged stock, a condition so inconsistent with the claim of the defendant's right to recover that further comment is unnecessary, save to say that from the nature of the stock and the general business of the bankrupt, the stock having been subject to sale for about three years, the inference necessarily arises that no part of the original stock was left at the date of proceedings in bankruptcy. In accordance with the stipulation, the entry will be:

Judgment for the plaintiff for $460.64.

NOTE.—*Limitation Upon the Rule of Mortgage of After-Acquired Property.*—The instant case it is perceived shows a mortgage, which requires the replacing of old stock sold with "new stock and additions from time to time," and it provides that "this mortgage and conveyance covers all after-acquired property, added to said business in any manner after the date of this mortgage or during the existence of said mortgage." Nevertheless, the court rules "that the defendant, in any event, could take under his mortgage only such goods or fixtures as he has shown title to, which were in existence at the date of the mortgage, *and those substituted for articles sold by purchase from proceeds of sales from such mortgaged stock.*" (Italics are ours.) This ruling seems a limitation against the express language of the mortgage, and to deny the right to mortgage after-acquired property, unless the future acquisition arises out of investment of funds coming from presently mortgaged property. It is to be noted also that there is no question in this case of possession taken by mortgagee in advance of attachment. Had that been done it is conceivable that the ruling would not have been as limited as it was. Burrill v. Whitcomb, 100 Me. 286, 61 Atl. 678, 1 L. R. A. (N. S.) 451. This case shows a mortgage on a stock of goods "and also all stock in trade, furniture and fixtures that may hereafter be acquired." The mortgagee took possession before levy of attachment, and his lien was sustained in accordance with the previous consent of the mortgagor expressed in the mortgage itself.

This rule seems approved by many cases, viz.: New England Nat. Bank v. Northwestern Nat. Bank, 171 Mo. 307, 71 S. W. 191, 60 L. R. A.

In Wright v. Voorhees, 131 Iowa 408, 108 N. W. 758, 117 Am. St. Rep. 429, what is called "a blanket mortgage," it is strongly intimated, would not be enforceable. The court said: "The cases authorizing the inclusion of after-acquired property and future advances will all be found to come far short of a general inclusion of everything the mortgagor may subsequently own and every indebtedness to the mortgagee which he may subsequently incur."

Fidelity & Deposit Company v. Sturtevant Co., 86 Miss. 509, 38 So. 783, 109 Am. St. Rep. 716, speaks of appellant recognizing that "there are certain restrictions thrown around the doctrine that a party can give a valid mortgage on after-acquired property, and that he cannot mortgage generally all of his property to be acquired within a given time after the date of the instrument." It was said: "The mortgagor, having an actual interest *in presenti* in the subject of which the future acquisition was a product, may give a valid lien on the products of said property already owned by him, because such products, though not *in esse* have a potential existence."

See also Deeley v. Dwight, 132 N. Y. 59, 30 N. E. 258, 18 L. R. A. 298, where there is a note with many cases cited to the same effect. See also Shores v. Doherty, 65 Wis. 153, 26 N. W. 577; Moore v. Terry, 66 Ark. 393, 50 S. W. 998.

The ruling made in the instant case, we think supported by the great weight of authority, but perhaps not applicable where possession is taken with the present consent of mortgagor, but possibly not where there is previous consent expressed in the mortgage. Nevertheless, the act of taking possession by mortgagee, whether by consent previously or presently given is considered very effective in the curing of defective mortgages. C.

ITEMS OF PROFESSIONAL INTEREST.

REPORT OF THE MEETING OF THE RHODE ISLAND BAR ASSOCIATION.

Some very interesting reports of the meeting of the bar association of Rhode Island, on December 7th, 1914, have been sent us by our esteemed correspondent and subscriber, Judge Thomas Z. Lee, of Providence.

The meeting was held at the Turks Head Club in Providence. Previous to the dinner and addresses the annual meeting of the association was held, at which the following officers were elected: President, Richard B. Comstock; Vice-Presidents, William P. Shef-

inal laws, reported that the committee had presented a bill to the last legislature, which failed of passage, despite the committee's recommendations. It was voted that the report of this committee be approved and that another effort be made to secure the enactment of the proposed amendments at the next session of the General Assembly.

Following the adjournment of the business meeting, the members and guests were ushered into the dining hall of the club, where a full course dinner was provided. During the meal an orchestra played a medley of popular airs, in which the entire assemblage joined with their voices. The most popular seemed to be "It's a Long, Long Way to Tipperary," which was frequently played and as frequently encored.

Seated at the head table were President Richard B. Comstock, retiring President, Charles C. Mumford; Chief Justice Clarke H. Johnson and Justices Darius Baker and William H. Sweetland of the Supreme Court, Presiding Justice Willard B. Tanner and Associate Justices Chester W. Barrows, John W. Sweeney, George T. Brown and Charles F. Stearns, of the Superior Court, former Chief Justice Charles Matteson and the two speakers of the evening.

The principal addresses were delivered by Dean Ezra R. Thayer, of the Harvard Law School, and Dean Talcott Williams, of the School of Journalism of Columbia University.

Dean Williams' address was on the subject of "The Neutrality of Belgium," upon which subject he said in part:

"The violation of the neutrality of Belgium by Germany is not to be considered alone or with reference to the fate of Belgium, but as a part of the great movement which the passage of the German troops across the Belgian frontier interrupted, but cannot defeat.

"Belgium is not the only neutralized state. For a century the world has been moving steadily forward along the path of creating great territories and small states, which treaties and the common agreement of nations preserve from war by neutralizing.

"The Monroe Doctrine itself is at bottom and in essence a declaration by the United States of the neutralization of Latin-America so far as the Powers of Europe are concerned. The whole Western Hemisphere, in a large sense, is a half of the world from which the United States proposed to exclude invasion from beyond the oceans and to secure peace in both continents, and all their islands and the isthmus which joins them.

"The pledge which Secretary Hay asked all the nations of the world to sign to protect the administrative entity of China was a step toward the neutralization of 4,000,000 square miles and 400,000,000 people.

"This steady movement and expansion of the principle of neutralization, and the increase of areas of peace has been in progress for just a century. The issue raised by the violation of the neutralization of Belgium is not a question limited to that country, but whether a great world movement, in which all nations have joined, shall be halted and destroyed by the act of one."

Judge Thayer's argument was on the subject of "Liberalizing the Rules of Evidence." After considering the many branches of this part of the law, Dean Thayer urged that more power and discretion be given the judges, making them more judicial and less administrative. "You must either trust your judges," said he, "or fear their caprice and discretion. Judges do not rule on the evidence of a book, but rather upon their own judgment and the peculiar circumstances surrounding each case and each witness." The entire lack of rules relating to evidence was not advocated, but rather that more should be left to the judges' discretion.

REPORT OF MEETING OF THE NEBRASKA STATE BAR ASSOCIATION.

The annual meeting of the Nebraska State Bar Association was held at Lincoln on Monday and Tuesday, December 28 and 29, 1914. Aside from the regular routine business and reports of the various committees, the program included the following addresses:

"The Courts and Constitutional Restraints," by the president, Mr. H. H. Wilson.

"Lawyers and Law Reform," by Judge E. B. Perry, of Cambridge, Neb.

"A Unified State Court System," by Mr. Herbert Harley, of Chicago.

"The Function of the Court in Jury Trials," by Mr. Wm. A. DeBord, of Omaha.

CORRESPONDENCE.

WHEN THE STATE PRACTICES LAW.

Editor Central Law Journal:

Is the state about to hang out its shingle, "Attorney at Law?" Is the lawyer being undermined? Can the state overthrow as of naught the ethics which the lawyer is bound to obey?

Corporations are enjoined from soliciting legal business; or, at least, the practice is condemned, and some states inflict punishment.

But, suppose the state practices law; or the very courts practice law in cases on hearing before them—what then?

Let us see.

For example, on the face of the summons in fourth class suits in the Municipal Courts of Chicago, appears: "Notice—Any defendant wishing information as to what steps it may be necessary for him to take for the purpose of making a defense, may obtain the same by making inquiry at the clerk's office." "The attention of the defendant is also called to the following provisions of the Municipal Court Act, section 43 (advice to litigants in bad rhetoric). Section 44 provides, among other things, that the clerk of the Municipal Court shall furnish suitors blank forms of all court papers."

No other court gives so much voluntary information to litigants as the above shows. But the municipal courts are not to blame; the legislature has made it obligatory.

That is, the state of Illinois is in the practice of law.

So, what more may be expected of the state's agents—judges of the municipal courts, clerks, bailiffs too, than that they should take a hand at the practice of law by advising and assisting litigants to make out their legal papers when their suits come up in court?

On the other hand, the best Christmas present the lawyer can give to his clients is, "Everybody his own lawyer." Such a book booms the lawyer's business.

Worse and more of it: "Conciliation" courts are now proposed. These will do away with lawyers altogether.

ELMER E. ROGERS.

Chicago, Ill.

HUMOR OF THE LAW.

Judge—What is your age, madam?

Witness—Twenty-seven and some months.

Judge—I want your exact age, please. How many months?

Witness—One hundred and twenty.

A gentleman who once served on an Irish jury tells an amusing story of his experiences. When the hearing was over and the jury retired to their room to consider their verdict, they found that they stood eleven to one in favor of an acquittal, but the one happened to be a very complacent old gentleman who rested his chin upon the head of a thick bamboo cane, and announced defiantly that he was ready to stay there as long as any of them.

The hours dragged on, evening arrived, and the old gentleman obstinately held out. The other jurors wearily arranged themselves to make a night of it. From time to time the old gentleman would contemplatively suck the head of the cane.

Finally he fell asleep, and the cane dropped heavily to the floor. Then one of the jurymen picked it up and found, to his surprise, that it was nearly full of Irish whiskey. The eleven passed the cane around, relieved it of its contents, and then awakened its slumbering owner. Slowly he lifted the cane to his mouth, looked at his watch, and then arose with the announcement, "Boys, I'm afther changin' me moind."—Legal Laughs.

As everybody knows, an English judge wears in court a great wig and a gown, and is addressed as "my lord." Public sentiment scarcely allows him to unbend, even out of court. Nevertheless, sometimes he does unbend.

It is related that Sir Henry Hawkins, who was so prominent in the prosecution of the famous Tichborne claimant, and who was afterwards a famous judge, was in the habit of wearing his hair extremely short.

He was once waiting for a train at the Epsom railway station on a race day, and a number of roughs came in. One of them behaved very badly to the judge, who remonstrated with him; and thereupon the rough invited Sir Henry to come out and "have it out with him."

The judge reflected that, as the men appeared to be of the criminal classes, some of the party might have appeared before him and would know him. So he took off his hat and said:

"Perhaps you do not know who I am."

His assailant looked at the closely cropped head, and edged off, 'S' help me, Bob!" he exclaimed, "a bloomin' prizefighter! Not me!"

The judge was not molested further.

On another occasion, Sir Henry on a ramble between assizes with a companion, stopped at a wayside inn, and joined in a game of skittles with two rustics. In an unguarded moment the judge took off his moleskin cap. One of the rustics, after eyeing him suspiciously, turned to go away.

"I don't mind being neighborly," said he, "but I'm hanged if I am goin' to play skittles with a ticket-of-leave man!"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Bankruptcy**—Breach of Contract.—Where a bankrupt contracted to furnish livery and baggage service to a hotel and pay $21,000 in monthly installments for five years and became a bankrupt, the hotel association could file a claim for damages for anticipatory breach of the contract.—In re Frank E. Scott Transfer Co., U. S. C. C. A., 216 Fed. 308.

2.——Composition.—The burden of sustaining specifications of objection to the confirmation of an offer of composition, rests on the objecting creditors.—In re Rivkin, U. S. D. C., 216 Fed. 218.

3.——Fraud.—Where a majority stockholder of a corporation, with knowledge of its precarious financial condition, agreed to sell to the corporation its stock of a par value of $5,100 for $2,000, receiving $500 cash and notes secured by a deed of trust covering all the corporation's assets for the balance, the transaction was fraudulent as against the corporation's

5.——Preference.—Preferential payments by the bankrupts to bona fide creditors are not ground for refusing confirmation of a composition.—In re Rivkin, U. S. D. C., 216 Fed. 218.

6.——Preference.—Among the essential elements of a preference voidable under Bankr. Act, are insolvency of the transferror at consummation of the preference, and a reasonable cause for the person receiving the preference to believe that a preference was intended.—Kentucky Bank & Trust Co. v. Pritchett, Okla., 143 Pac. 338.

7. **Banks and Banking**—Joint Note.—Where defendant and another executed to a bank a joint note for $3,500, the bank on maturity of the note was entitled to apply defendant's general deposit to its payment; and it was immaterial that the bank had no demand or set-off against the other joint maker, nor could defendant complain that suit was not brought for the whole amount of the note, but only for the balance due.—Rush v. Citizens' Nat. Bank, Ark., 169 S. W. 777.

8. **Bills and Notes**—Accommodation.—A note secured by a trust deed made by a wife upon her husband's representation that he could procure a loan from an estate for which he was trustee is not "accommodation paper," though he procured the loan elsewhere.—Burr v. Beckler, Ill., 106 N. E. 206.

9. **Carriers of Goods**—Delay.—While a consignee of poultry, which was injured by defendant's delay, cannot recover for the physical injuries to the birds unless he gives notice before delivery, as required by the bill of lading, he may recover for damages occasioned by the depreciation in the market price before delivery.—Jett & Brooks v. Southern Ry. Co., Tenn., 169 S. W. 767.

10.——Partners.—In the absence of any arrangement constituting carriers partners or joint and several undertakers, each carrier except the initial carrier in an interstate shipment under the Carmack amendment is liable only for loss or injury on its own line.—Chicago, R. I. & P. Ry. Co. v. Harrington, Okla., 143 Pac. 325.

11. **Carriers of Passengers**—Bailee.—Where a car porter carried plaintiff's suit case out of the car at destination, and when plaintiff alighted the case was gone, the carrier was not liable as a carrier, but at most as a bailee.—Union Pac. R. Co. v. Grace, Wyo., 143 Pac. 353.

12. **Commerce**—Articles in.—The sending of means of education by correspondence through the mails is commerce.—Cheney Bros. Co. v. Commonwealth, Mass., 106 N. E. 310.

13.——Explosives.—A shipment of explosives in interstate or foreign commerce while in course of transportation is subject exclusively to the regulations prescribed by the Interstate Commerce Commission, and state or local laws have no application to it.—Actiesselskabet Ingrid v. Central R. Co. of New Jersey, U. S. C. C. A., 216 Fed. 72.

14.——Intoxicating Liquor.—The Webb-Kenyon Act, relative to the interstate shipment of intoxicating liquor, is not violated where the liquor is intended for the personal use of the consignee.—Adams Express Co. v. Commonwealth, Ky., 169 S. W. 603.

15.——Intoxicating Liquor. — Where liquor ators does not prevent a conviction of the other under the rule that two guilty persons are necessary to a conspiracy.—Rutland v. Commonwealth, Ky., 169 S. W. 584.

18.——Overt Act.—Conspiracy to commit a crime against the United States, denounced by Rev. St. § 5440, is distinguishable from the common-law offense in that it requires an overt act, which when committed completes the offense, without reference to the ultimate success of the conspiracy.—Ryan v. United States, U. S. C. C. A., 216 Fed. 13.

19. **Contracts**—Breach of.—No action can be maintained for breach of a contract so indefinite that it is impossible to ascertain with reasonable certainty the intent of the parties.—Central Mortgage Co. v. Michigan State Life Ins. Co., Okla., 143 Pac. 175.

20.——Compounding Crime.—A contract having for its sole purpose the recovery of stolen property, even by a compromise of the civil liability, is not illegal as compounding a criminal offense.—Rieman v. Morrison, Ill., 106 N. E. 215.

21.——Consideration.—The payment of a valid debt by one who owes it can constitute no consideration for a promise by the creditor.—Village of Seneca Falls v. Botsch, 149 N. Y. Supp. 320.

22.——Dispute.—When the terms of an oral contract are in dispute, the whole conversation concerning the trade and the various negotiations leading up to it are, as a general rule, admissible.—Ross v. Reynolds, Me., 91 Atl. 952.

23.——Impeachment.—One who in the full possession of all his faculties signs a written or printed contract without reading the same, although having full opportunity to do so, cannot impeach it by parol on the ground that he intended to sign something different—Hickman v. Sawyer, U. S. C. C. A., 216 Fed. 281.

24.——Public Policy.—Where plaintiff, not having been properly licensed, contracted with defendant school district to teach a school, the parties were in pari delicto, and the district could not recover money paid for services under the contract.—School Dist. No. 46 of Sedgwick County v. Johnson, Colo., 143 Pac. 264.

25. **Conversion** — Reconversion. — "Reconversion" means the putting of money into land, or land into money.—Mattison v. Stone, S. C., 82 S. E. 1046.

26. **Corporations** — Accommodation Guarantor.—A corporation cannot ordinarily become bound as an accommodation guarantor, and its naked promise as surety or guarantor with or without an independent consideration cannot be enforced.—In re Romadka Bros. Co., U. S. C. C. A., 216 Fed. 113.

27.——Charter Powers.—Corporations exercise only such powers as are expressly or by necessary implication granted, and such as are necessary to effect those powers which are granted.—National Mercantile Co. v. Mattson, Utah, 143 Pac. 223.

28.——Stockholder Liability.—Where claimant was fraudulently induced to purchase certain stock in defendant company by promises of large dividends, high-salaried employment, and a block of common stock as a bonus, and he proclaimed his status as a stockholder until after the appointment of a receiver for the company, he was not entitled to rescind and to be regarded as a creditor.—Bank of North America v. Pennsylvania Oil Refining Co., U. S. D. C., 216 Fed. 377.

29. **Criminal Evidence** — Admissibility. — Where defendant and D were arrested for killing beyond a reasonable doubt of the guilt of accused.—People v. Spira, Ill., 106 N. E. 241.

32.——Attempt.—An attempt to commit a crime consist of an intent to commit it and a direct ineffectual act done towards its commission.—People v. Petros, Cal., 143 Pac. 246.

33.——Circumstantial Evidence.—Where an unlawful killing and defendant's participation therein were affirmatively shown by defendant's own testimony, instructions, applicable to circumstantial evidence only, that a conviction was not warranted unless the proof was inconsistent with any theory other than that of defendant's guilt were properly refused.—People v. Raber, Cal., 143 Pac. 317.

34.——Evidence.—Depravity of character and abandoned habits are not in themselves evidence of insanity, nor is the commission of an unnatural or atrocious crime necessarily evidence thereof.—People v. Spencer, Ill., 106 N. E. 219.

35.——Incest.—In a prosecution for incest, prior acts of intercourse between the parties, a stepfather and his young stepdaughter, are admissible as original evidence.—Vickers v. State, Tex., 169 S. W. 669.

36. **Damages**—Husband and Wife.—Where defendant sold soda pop, to be retailed in a business owned jointly by plaintiff and her husband, there was sufficient privity between plaintiff and defendant for her to maintain an action for injuries received by the bursting of a bottle, though plaintiff might not be a partner with her husband and was merely acting under his direction.—Colyar v. Little Rock Bottling Works, Ark., 169 S. W. 810.

37.——Profits.—Profits growing out of a contract, and lost by reason of its breach, and which are ascertainable by calculation, are recoverable as damages.—Wilkes v. Stacy, Ark., 169 S. W. 796.

38. **Death**—Presumptive. — The unexplained absence of a person for more than seven years is prima facie, but not conclusive, evidence of his death.—Thompson v. Millikin, Kan., 143 Pac. 430.

39. **Deeds**—Condition Subsequent.—Where a deed conveys only an easement and not the fee, the right to maintain an action of forfeiture for breach of a condition subsequent is not limited to the grantor or his heirs, but may extend to the assignee of the grantor.—Stevens v. Galveston, H. & S. A. Ry. Co., Tex., 169 S. W. 644.

40.——Condition Subsequent.—Courts will not construe the language in a deed into a condition subsequent, unless, construed strictly, it will admit of no other reasonable interpretation.—Inhabitants of Town of Frenchville v. Gagnon, Me., 91 Atl. 951.

41. **Descent and Distribution** — Personal Property.—An heir cannot sue to recover the personal property of the intestate, but such action must be maintained by the personal representative.—Martin v. Franklin, Ky., 169 S. W. 599.

42. **Divorce**—Disavowal of Love.—Discourtesy, such as denial of social intercourse, disavowal of love, and expression of hatred, while the parties reside together, the husband providing support and the wife performing the ordinary household duties, is not alone ground for divorce.—Wills v. Wills, W. Va., 82 S. E. 1092.

43.——Modification of Decree.—After death of plaintiff, to whom custody of a minor child has been awarded, the divorce decree may be modified by giving such custody to defendant on motion made in the divorce action without

46. **Election of Remedies**—Inconsistency.—That petition, claiming ownership, asked that the deed by which plaintiff had conveyed the land be set aside, and also alleged that the land had been reconveyed to her, did not require election, as invoking inconsistent remedies by setting up title and denying titel.—McClellan v. McClellan, Ga., 82 S. E. 1069.

47. **Equity**—Decree.—There is no rule in equity that the court shall in its decree find all the facts necessary to sustain the decree, except where in the absence of a finding of facts it would be impossible to tell what the decree in fact meant.—Liebig v. Matthews, U. S. C. C. A., 216 Fed. 1.

48.——Judicial Notice.—To authorize a court to sustain a demurrer to a bill by reason of matters of which it takes judicial notice requires a very clear case.—United States v. Mackey, U. S. C. C. A., 216 Fed. 126.

49.——Laches.—While the lapse of time is an element which courts of equity consider in sustaining ro refusing to sustain the defense of laches, time alone ordinarily is not sufficient to constitute the defense, but, in addition thereto, the situation of the parties must have so changed as to render the prosecution of the suit inequitable.—Schwartz v. Loftus, U. S. C. C. A., 216 Fed. 320.

50.——Rescission.—One who has been induced by the fraud of nonresidents to exchange certain stock for bonds is not required to go into another state and there sue for a rescission on pain of being held guilty of laches.—Page Belting Co. v. F. H. Prince & Co., N. H., 91 Atl. 961.

51. **Estoppel**—Fraud.—A fraudulent intent is not necessary to estoppel, but it is enough that, but for it, a fraudulent effect would result.—Helwig v. Fogelsong, Iowa, 148 N. W. 990.

52. **Evidence**—Admissibility.—In an action by a trustee in bankruptcy to recover insurance upon a stock of goods, which was burned after the petition in bankruptcy was filed and before adjudication, a declaration which one of the stockholders of the bankrupt corporation made after the adjudication, that he procured another to burn the property, is not admissible as a declaration against interest.—Hamburg-Bremen Fire Ins. Co. of Hamburg, Germany, v. Ohio Valley Dry Goods Co.'s Trustee, Ky., 169 S. W. 724.

53.——Experts.—Neighbors and friends may, without qualifying as experts, in an action against an administrator for services to deceased, testify to the value of services.—Moore's Adm'r v. Pierce, Ky., 169 S. W. 620.

54.——Mailing Letter.—The mailing of a letter properly addressed and stamped makes a prima facie case of delivery in due course of mail.—National Live Stock Ins. Co. v. Wolfe, Ind., 106 N. E. 390.

55.——Telegram.—Where an original telegram was outside the court's jurisdiction, a copy was admissible.—Spaulding v. Smith, Tex., 169 S. W. 627.

56. **Executors and Administrators**—Stockholder Liability.—The administratrix of a decedent is a necessary party to a suit to establish and enforce the statutory liability of the estate as owner of stock in an insolvent corporation.—Schwartz v. Loftus, U. S. C. C. A., 216 Fed. 320.

57. **False Pretenses**—Confidence Game.—In a prosecution for obtaining money by means of a confidence game whereby the complaining witness was induced to bet on the races and was defrauded, evidence that accused and his confederates had by the same means defrauded another is competent for the purpose of showing accused's guilty knowledge.—People v. Strosnider, Ill., 106 N. E. 229.

58. **Fixtures**—Intention.—There is no well-defined general rule by which the legal character of fixtures may be determined; it depending on the relation of the litigants, the kind and use of the property, and the intention of the owner, rather than the permanent annexation to the freehold.—Henry Clay Fire Ins. Co. v. Barkley, Ky., 169 S. W. 747.

59. **Fraud**—Misrepresentation. — A representation as an inducement to the sale of a secondhand automobile, as to its age, or the length of time it had been used, is material, and, if false, is actionable.—Ross v. Reynolds, Me., 91 Atl. 952.

60.——Presumption.—Fraud is never presumed, and, being criminal in its nature, must be clearly proved, but may be inferred from facts proved.—J. M. Robinson Norton & Co. v. Stalcup, Ind., 106 N. E. 395.

61. **Fraudulent Conveyances**—Homestead.—A conveyance of a homestead is not subject to attack as fraudulent.—Farmers' & Merchants' Bank v. Dalker, Iowa, 148 N. W. 1020.

62.——Reconveyance.—A reconveyance by a mother of land conveyed to her by her daughter, which she agreed to hold in trust, after a levy under an execution against the mother, could not be assailed by those claiming under the execution.—J. M. Robinson Norton & Co. v. Stalcup, Ind., 106 N. E. 395.

63. **Guaranty**—Notice of Acceptance.—Where a guaranty is to become binding on the signers only after notice of acceptance, it is not necessary that such notice be given directly by the guarantees, but any notice that they are acting on the faith thereof, derived from other sources, is sufficient.—Asmussen v. Post Printing & Publishing Co., Colo., 143 Pac. 396.

64. **Highways**—Abandonment. — An "abandonment" of a highway involves more than mere nonuser, it requires also an intent on the part of the public to abandon, and is not effected by obstructions or encroachments, or by failure to keep the highway in repair.—McCarl v. Clarke County, Iowa, 148 N. W. 1015.

65. **Homicide**—Conspiracy. — Where defendant and two others conspired to rob decedent of her jewelry and money, and during the process one of the conspirators killed decedent while defendant searched for valuables, defendant was guilty of murder, though he took no part in the actual killing.—People v. Raber, Cal., 143 Pac. 317.

66.——Procuring Miscarriage.—One who, in an unlawful attempt to produce a miscarriage, inflicts injury upon a woman, from which she dies, is guilty of murder in the second degree.—State v. Moon, Iowa, 148 N. W. 1001.

67. **Husband and Wife** — Maintenance. — Where the difference between a husband and wife, which resulted in the husband's leaving home, were caused by the wife's ill health and the husband's failure to make demonstrations of his affection, although his wife was very high-strung and exacting, the wife is properly granted an allowance for maintenance of herself and infant child.—Hodgen v. Hodgen, Ky., 169 S. W. 713.

68. **Indemnity**—Measure of Damages.—The measure of damages for breach of a contract of indemnity is not the amount or liability incurred, but the amount actually paid by the personal indemnified on account of the loss.—In re Lathrop, Haskins & Co., U. S. C. C. A., 216 Fed. 102.

69. **Insane Persons**—Disaffirmance.—The rule that a minor after becoming of age may disaffirm a conveyance made during his minority by bringing ejectment for the premises does not necessarily apply in all cases and in all circumstances to deeds of insane persons.—Walton v. Malcolm, Ill., 106 N. E. 211.

70. **Insurance**—Change of Title.—That one person acquired all the shares of a mercantile corporation was not a change of title which would avoid an insurance policy issued in favor of the corporation.—Hamburg-Bremen Fire Ins. Co. of Hamburg, Germany, v. Ohio Valley Dry Goods Co.'s Trustee, Ky., 169 S. W. 724.

71. Incontestability.—A clause in an insurance policy that it should be incontestable after one year bars a defense after that period on the ground of fraud in procuring the insurance.—Weil v. Federal Life Ins. Co., Ill., 106 N. E. 246.

72.——Waiver.—Where insurer investigates liability, and then rejects claim and denies liability, clause making loss payable 60 days after proofs held waived, and an action may be brought at once.—National Live Stock Ins. Co. v. Wolfe, Ind., 106 N. E. 390.

73. **Joint Adventures**—Secret Profit.—Where persons assume the relation of joint adventurers neither is allowed to make a secret profit out of the undertaking.—Selwyn & Co. v. Waller, N. Y., 106 N. E. 321, 212 N. Y. 507.

74. **Judgment**—Res Judicata.—Where work under a contract was stopped by mutual consent, and plaintiff recovered for work done, when there had been no breach of contract by either party, the judgment was not res judicata as to his right to subsequently recover for loss of profits.—Dreyer v. McCormack Real Estate Co., 149 N. Y. Supp. 322.

75. **Judicial Sales**—Confirmation. — Although a judicial sale of land has been confirmed, and a writ of possession awarded, the purchasers have not the legal title, until conveyance is made to them by the commissioner.—Likens v. Pate, Ky., 169 S. W. 734.

76. **Kidnapping**—Surrender of Control.—A father, who by agreement surrendered the custody of his minor child to his wife, is not guilty of kidnapping, because he enticed the child away from the custody of the mother.—State v. Powe, Miss., 66 So. 207.

77. **Landlord and Tenant** — Mortgage. — Where a lease required the lessee to erect certain buildings upon the premises, they to be his property at the end of the term, the lessee could mortgage such buildings, and the mortgagee succeeded to the lessee's right of removal.—Oregon-Washington R. & N. Co. v. Eastern Oregon Banking Co., Wash., 143 Pac. 154.

72. **Life Estates**—Waste.—A tenant may without becoming liable for waste, do what is required for the proper enjoyment of his estate to the extent that his acts and managements are sanctioned by good husbandry in the locality in which the land is situated.—Thomas v. Thomas, N. C., 82 S. E. 1032.

79. **Limitation of Actions**—Cross-Complaint. —A defendant may set up in cross-complaint a cause of action which was not barred by the statutes of limitations at the time the plaintiff's action was filed, and such cause of action does not become barred by the statute during the plaintiff's action.—Zink v. Zink, Ind., 106 N. E. 381.

80. **Master and Servant**—Assumption of Risk. —Where a servant as representative of the master is in control of the place of work and himself undertakes its performance, he assumes, not only the dangers that are obvious, but also such as ordinary care in inspecting the place could have enabled him to discover.—Louisa Coal Co. v. Hammond's Adm'x, Ky., 169 S. W. 709.

81.——Assumption of Risk.—The rule that an employe in a gravel pit takes the chance of injury from the falling of the embankment does not apply where the embankment consists of such material that it may reasonably be expected not to fall.—Dimetre v. Red Wing Sewer Pipe Co., Minn., 148 N. W. 1078.

82.——Intervening Cause.—Where an employer employed a negligent system of operating its mill, a fellow servant's negligence in using or applying such negligent system was not, as matter of law, an independent intervening cause defeating a recovery by an injured employe.—Donnelly v. Ft. Dodge Portland Cement Corporation, Iowa, 148 N. W. 982.

83.——Respondeat Superior.—A master is liable for injuries from the negligence of a fellow servant occupying such a relation to the injured party or to his employment as to make his negligence the negligence of the master.—Steele v. Grant, N. C., 82 S. E. 1038.

84.——Statutory Duty.—Recovery by a miner injured by impure air caused by the failure of a mine operator to comply with the statutes regulating ventilation cannot be defeated because he drove, at the operator's direction, a shaft ahead of the air shaft.—Log Mountain Coal Co. v. Crunkleton, Ky., 169 S. W. 692.

85.——Substantial Compliance.—Performance of an employment contract must be substantial compliance, except that non-performance is excused when caused by the fault of the other party.—Johnson v. Bass, Ga., 82 S. E. 1053.

86. **Mortgages**—Assignment.—Where a mortgagee in possession conveys the property by deed it operates as an assignment of the mortgage.—Farnsworth v. Kimball, Me., 91 Atl. 954.

87.——Judgment Creditor.—No person in the line of redemptioners nor an intermeddler, may, by tender of payment of a judgment, impair or destroy a judgment creditor's right to use the judgment to effect redemption.—Orr v. Sutton, Minn., 149 N. W. 1066.

88.——Redemption.—A purchaser at an execution sale, under a judgment rendered against a mortgagor subsequent to the making of the mortgage, may redeem from the mortgage, notwithstanding a conveyance after the execution sale by the mortgagor to the mortgagee.—Cowing v. Britt, Ark., 169 S. W. 783.

89. **Municipal Corporations**—Classification. —Cities are entitled to make reasonable classification of grants and privileges, and may attach dissimilar conditions and impose dissimilar burdens on each class.—Postal Telegraph Cable Co. v. City of Newport, Ky., 169 S. W. 700.

90.——Special Assessment.—That a street 180 feet wide is improved only to a width of 60 feet at its center does not divest an abutting owner from his character as such nor relieve him from liability for an assessment for the improvement.—Wing v. City of Macon, Ga., 82 S. E. 1062.

91. **Negligence**—Nuisance.—One engaged in a lawful business, which does not create a nuisance, is not liable for an incidental injury to another, resulting therefrom, without proof of negligence or fault on his part.—Actiesselskabet Ingrid v. Central R. Co., of New Jersey, U. S. C. C. A., 216 Fed. 72.

92.——Proximate Cause.—Two causes may both be proximate or may so concur or unite as to be together the proximate cause of an injury, and in such case neither cause releases the party responsible for the other cause of liability.—Donnelly v. Ft. Dodge Portland Cement Corporation, Iowa, 148 N. W. 982.

93.——Proximate Cause.—To constitute proximate cause, the injury must be the natural and probable consequence of the negligence, and be such as an ordinarily prudent person ought to have foreseen, might probably occur as a result of the negligence.—Jenkins v. La Salle County Carbon Coal Co., Ill., 106 N. E. 186.

94.——Safe Place to Work.—Though negligence alleged by the complaint of a railroad employe for injury from the explosion of a torpedo on the track under his push-car is the placing and leaving of the torpedo on the track, the action is for failure to make and keep the place of work reasonably safe.—Southern Ry. Co. v. Howerton, Ind., 106 N. E. 369.

95. **Partition**—Judicial Sale.—Where an infant owned a two-thirds' interest in certain real property in fee, and a remainder in the other third, set apart to defendant as dower, they were not joint owners, and a judicial sale for division could not be had under Civ. Code Prac. § 490.—Van Meter v. Van Meter, Ky., 169 S. W. 592.

96.——Riparian Owners.—A suit to determine the various rights of riparian proprietors in a stream flowing past their land as between themselves is not a suit for partition of land.—Tracey Development Co. v. People, N. Y., 106 N. E. 330.

97. **Partnership**—Retiring Partner.—A retiring partner who was a member of the firm when plaintiff was engaged is liable for her wages, where plaintiff had neither notice of dissolution nor knowledge of facts charging her with notice.—Egholm v. Williams, Wash., 143 Pac. 152.

98. **Perjury**—Self-Incrimination. — While a witness before a grand jury may decline to answer questions tending to incriminate him, yet, if he answers falsely, perjury may be assigned thereon.—People v. Miller, Ill., 106 N. E. 191.

99. **Principal and Agent**—Acceptance of Benefits.—A principal cannot accept and retain the benefit of a bargain made for him by his agent and refuse to pay the promised consideration. —McCann v. Clark, Iowa, 148 N. W. 1025.

100. **Reformation of Instruments**—Laches.—Where an illiterate person conveyed his property to his wife in reliance on false statements

that the deed contained an agreement to reconvey, his failure to sue to reform the deed, held not barred by laches, though he delayed more than 13 years, where no rights of third parties intervened.—Rigell v. Gaskins, Ga., 82 S. E. 1057.

101. **Remainders** — Merger.—The reversion and the life estate of the one on whose death the remainder was contingent, uniting in one person, would merge and destroy the remainder. Hill v. Hill, Ill., 106 N. E. 262.

102. **Removal of Causes**—Foreign Corporation.—A state statute requiring a foreign corporation, as a condition of being permitted to enter or remain in the state, to stipulate that it will not exercise its constitutional right to remove suits to the federal courts or prosecute suits therein is invalid, and revocation of a corporation's license under such statute may be restrained.—Western Union Telegraph Co. v. Frear, U. S. D. C., 216 Fed. 199.

103.——Notice.—Judicial Code, § 29, providing that written notice of intent to file a petition and bond for removal shall be given to the adverse party prior to filing the same, is mandatory and an unexcused failure to give such notice is ground for remand.—Arthur v. Maryland Casualty Co., U. S. D. C., 216 Fed. 386.

104. **Sales**—Bill of Lading.—Buyer refusing to make payment on goods held to pass no title by transferring bill of lading to an innocent purchaser.—Orilla Lumber Co. v. Chicago, M. & P. S. Ry. Co., Wash., 143 Pac. 152.

105.——Co-Warrantor.—Where a bank, at different times, took assignments of drafts with bills of lading attached for two different automobiles, sold by the same buyer to the same seller, the bank was a co-warrantor in both trnsactions, and the amount received by it upon the second draft could be attached by the buyer in an action to recover for breach of warranty in the sale of the first car.—Mobile Auto Co. v. R. W. Sturges & Co., Miss., 66 So. 205.

106. **Set-Off and Counterclaim**—Breach of Contract.—Where plaintiff's breach of earlier logging contracts necessitated defendant's paying an increased price to have the contracts completed, defendant is, in an action for sums due on the contract, entitled to set off his increased expenditure as a counterclaim.—Philadelphia Veneer & Lumber Co. v. Garrison, Ky., 169 S. W. 714.

107. **Specific Performance**—Fraud. — Fraudulent representation by plaintiff's agent in negotiating for exchange of lands held to prevent specific performance, though defendant concealed from plaintiff the making of such representation by his agent, even assuming that such concealment constituted fraud.—Heitman v. Clancy, Iowa, 148 N. W. 1011.

108. **Trusts**—Equity.—Equity will not allow a trust to fail for lack of a trustee holding legal title.—Sherlock v. Thompson, Iowa, 148 N. W. 1035.

109.——Ex Maleficio.—To establish a trust ex maleficio there must be an element of positive fraud, by means of which the legal title is wrongfully acquired; something more than a mere verbal promise.—Hunter v. Field, Ark., 169 S. W. 813.

110. **Vendor and Purchaser** — Constructive Notice.—Constructive notice furnished by a recorded instrument as to the boundary of the land and every other material fact recited therein is as conclusive as actual notice.—Loeb v. Conley, Ky., 169 S. W. 575.

111.——Lien.—One who levies upon land belonging to his judgment debtor, which is shown by the deed to be incumbered by a lien for the purchase price, acquires only a lien inferior to the purchase-money lien.—Likens v. Pate, Ky., 169 S. W. 734.

112.——Reliance on Representations.—Purchasers of a lot could rely upon representations of the seller's agent that the lot selected by them was the lot designated as lot 35 on a map, and the vendor could not show that the purchasers might have ascertained that such representations were untrue.—Taber v. Piedmont Heights Bldg. Co., Cal., 143 Pac. 319.

113.——Time of Essence.—Where time is not of the essence of a contract for the sale of land, nonpayment of the purchase price at the time stipulated will not authorize a rescission or forfeiture.—Burkhalter v. Roach, Ga., 82 S. E. 1059.

114. **Waters and Water Courses**—Appropriation.—A complaint in a suit by an upper user against lower riparian owners, alleging that they were using more water than they were entitled to, and failing to allege any specific wrong committed by defendants, held demurrable.—Tracey Development Co. v. People, N. Y., 106 N. E. 330.

115.——Riparian Owner.—Riparian owners are not entitled to take the waters of a stream in accordance with the acreage of their property, and no one of them can take so much water as to injure the rights of others.—Henderson v. Goforth, S. D., 148 N. W. 1045.

116. **Wills**—Construction.—A testator's will held to contemplate that the proceeds of his life insurance should be used only to discharge his one-half of the purchase price of land which he and his stepmother had jointly bought, and hence the devisee of the stepmother is bound to pay her unpaid share of the purchase money. —Penick v. Tribble, Ky., 169 S. W. 607.

117.——Destruction of.—Destruction of will by agreement of all parties in interest, held to vest in each of testatrix's children an undivided interest as an heir at law; and written contract to that effect was unnecessary.—Dueringer v. Klocke, 149 N. Y. Supp. 332.

118.——Execution.—That a testator, in signing his name on one of the sheets of his will, omitted one letter of his first name did not affect the validity of the will, where it appeared that he intended to and did sign it.—Boone v. Boone, Ark., 169 S. W. 779.

119.——Fraud.—That the execution of a second will has been procured by fraud of the principal beneficiary, to the injury of a legatee under the first will, is ground for refusal to probate the second will.—Churchill v. Neal, Ga., 82 S. E. 1065.

120.——Income.—Where testator bequeathed the residue of his estate, including certain stock, to a trustee to pay the income to his widow, and after her death to distribute the corpus among others, dividends declared during the life of the widow by the corporations constituted income and not capital.—Washington County Hospital Ass'n v. Hagerstown Trust Co., Md., 91 Atl. 877.

121.——Lapse of Legacy.—Where the will manifests an intent, in making a gift of an aggregate sum to certain relations, to provide for them as a class, the designation of each individual by name or the use of words denoting equality, will not make the gift one of a separate interest which would lapse by death of the donee before that of the testator.—In re Ives' Estate, Mich., 148 N. W. 727.

122.——Trust.—A will need use no particular words to create a trust, but it is enough that from all the language in it, a trust is fairly implied.—In re Dewey's Estate, Utah, 143 Pac. 124.

123.——Undue Influence.—Where testator virtually disinherited his wife so far as he could, the mere fact that certain relatives, one of whom received the bulk of his property under the will, had an opportunity to exercise undue influence did not authorize the finding that such influence was exercised.—In re Burke's Will, 149 N. Y. Supp. 142.

124. **Witnesses**—Redirect Examination.—In a prosecution for incest, where the defense, in cross-examining the prosecuting witness, attempted to show that her statement that the act occurred while the parties were standing, and that conception was unreasonable, it was proper for the state to show on redirect examination that defendant and witness had previously had intercourse on numerous occasions. —Vickers v. State, Tex., 169 S. W. 609.

125.——Wife.—After termination of the marriage relation, one spouse is not incompetent to testify in a case in which the other is a party, as to independent facts, which are within the witness' knowledge and not privileged communications.—St. Louis & S. F. R. Co. v. Goode, Okla., 142 Pac. 1185.

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Central Law Journal.

ST. LOUIS, MO., JANUARY 22, 1915.

FAITH AND CREDIT CLAUSE AS REGARDS STATUTES AND THEIR CONSTRUCTION.

In Western Life Indemnity Co. v. Rupp, 35 Sup. Ct. 37, the Supreme Court appears to lay down the rule that to secure the enforcement of a foreign statute, it may not be sufficient to plead and prove it as a fact, but also there should be pleaded and proved, as a fact, construction placed upon it by the enacting state.

In this case the Court of Appeals of Kentucky thought that the legislature of Illinois never intended an Illinois statute to have "an extraterritorial effect," and for this reason it was not regarded in a case in Kentucky court. This disregard was claimed to be in violation of the faith and credit clause of the constitution, a mere inspection of the statute being appealed to as demonstrating that such was not its meaning.

Mr. Justice Pitney said: "It does not appear that the court's attention was called to any decision by the courts of Illinois placing a different construction, or, indeed, any construction upon the section in question. If such decision existed, it was incumbent upon defendant to plead and prove it as matter of fact. We are referred to no authoritative judicial construction of the statute in the state of its origin, nor have we searched for any, for what is matter of fact in the state court is matter of fact in this court upon review."

There are two or three things about this statement which would seem to call for special notice: (1) Naturally a court of the state of origin of a statute would not be called upon to rule that it had no extraterritorial operation. The question of a judgment by a court in another state as operating extraterritorially, the judgment of that court ought to be protected under the faith and credit clause of the Constitution, whether as an original proposition its reasoning were opposed or not. Certainly, too, the foreign court's judgment would be respected, if extraterritorial effect were denied the statute, as the instant case shows.

(2) The pleader of a foreign statute is bound to plead both affirmatively and negatively, namely affirmatively that there is a foreign statute and negatively that no construction by a court of the state of origin has been placed on it. Or if it has been construed, he must aver and prove that no subsequent adjudication has displaced the construction that he exhibits as matter of fact to the court.

This reasoning cannot be met, we think, by any claim that a statute is so plain and unambiguous that it speaks for itself. The rule, if one of law, could admit of no such exception, because it is after all merely a matter of private opinion that any statute is of this nature. It might, however, make search for adjudication, in order to establish the negative of which we speak, something like looking for a needle in a haystack.

But, is it not evident that proof of such a negative often would be attended with the greatest of difficulty? And is it in fair compliance with the faith and credit clause of the constitution that the statute of a state should not be given the meaning it bears upon its face, unless an objector shows it has been construed a particular way?

The idea of negative proof of non-construction by the court of origin of a statute ought also to embrace the idea of no subsequent amendment or repeal thereof. In this way the value of the faith and credit clause could be frittered

Proof of a foreign law may be in several ways, one is by an authenticated copy of the law, and another is by testimony of reliable witnesses as to what it is. But all of it is in the past tense and practically it might be impossible really to bring it down to governing force as of a time in relation to a matter before a court. But in none of the cases we have read has the principle of what has been shown to exist continues to exist, until the contrary has been made to appear, not been recognized. And we think no principle is more wholesome than this one with respect to foreign law. A statute, therefore, exhibited as the law of a state should carry a presumption to a foreign court that it is the law thereof, according to the foreign court's construction thereof, unless an objector may show as matter of fact that it has been amended or repealed or construed otherwise. An authenticated statute offered in evidence ought, at least, to be deemed *prima facie* evidence that it is the law of another state or of a foreign country.

NOTES OF IMPORTANT DECISIONS

BANKRUPTCY — SOLVENCY OF MEMBERS OF A PARTNERSHIP.—The question has been much debated in lower federal courts with the result of conflict of opinion, whether a partnership is a legal entity, which may be declared to be bankrupt, irrespective of the fact of the solvency or insolvency of the members thereof. But this conflict has been deemed to be settled in favor of the proposition that a partnership is not to be deemed bankrupt if its members or any of them are solvent, by Francis v. McNeal, 228 U. S. 695.

In Abbott v. Anderson, 106 N. E. 782, the Supreme Court of Illinois holds that where there was a composition by an alleged bankrupt partnership accepted by the creditors, upon theory by the court, that thereby the

wards brought suit against a solvent partner of such partnership.

The opinion of the Illinois court shows the grounds of objection by these creditors in the bankruptcy proceeding on two points, (1) that the bankrupt court had no jurisdiction over assets of the individual partners, and (2) that the partners had not been adjudicated bankrupts. The district court and its referee took the view that the assets of the partnership could be regarded separately, and overruled the objection.

This, it is true, was a decision the court had authority to make, and its decision unappealed from would be the law of the case. But what did such a decision embrace? It only embraced the question of jurisdiction, and only, argumentatively, involved the question of release of the partners.

How would this be with the non-objecting creditors? Surely, it would be the case of the conferring of jurisdiction over subject-matter by consent, a something we have always understood not to be permissible. Why should an objecting creditor, merely objecting on jurisdictional grounds, be placed in worse plight than one who accepts benefits from a court without jurisdiction over the subject-matter? Should the former be penalized for his effort in trying to keep the court from committing error?

In this case it seems to us that the judgment of the district court should be deemed to involve nothing more than that it could proceed as it was proceeding.

PLEADING AND PRACTICE—DAMAGES UNDER FEDERAL OR STATE LAW IN MASTER AND SERVANT CASES.—The case of Ingle v. Southern Ry. Co., 83 S. E. 744, decided by North Carolina Supreme Court, is more important in what it assumes to be the law than in anything it really decides.

This was a suit by a servant's administrator against a railroad for death from injury suffered in the course of employment and assignment of error was predicated upon instructions upon the measure of damages as based on state law, rather than on federal law, the federal law being the federal employers' liability act.

Heretofore we have referred to decisions where petition was amended according to ex-conform to federal law as to parties who should sue for death by servant in the course of duty. 80 Cent. L. J. 26.

The North Carolina court enforces strongly the importance of this suggestion, and goes further than the decision by the Supreme Court above instanced. It rules, in effect, that the legal representative of the servant of a railroad need not show by his petition whether he sues under state or federal law, but the case will be tried under the law which fits the facts.

The court considers the assignment and then discusses the proof to ascertain which law was applicable to the case, and, holding that it was insufficient to show that the injury from which death resulted occurred in interstate commerce the instructions of the court on the measure of damages was correct.

We desire to repeat our suggestion in 80 Cent. L. J. 26 as to entire correspondence between federal and state law, so that whether the injury be in interstate comerce or under state law there will be no necessity whatever of courts in pleading or variety in instructions if there is question of fact as to which law the action comes under. We could well imagine there might have been submitted to the jury this question of fact before the court, though it was, in effect, held there need be no counts, such as spoken of in Wabash R. Co. v. Hayes, supra. Uniformity of law on this subject is, to our mind, fully as important as in any of the bills proposed by the Commissioners on Uniform State Laws.

NEGOTIABLE INSTRUMENTS LAW—REPEAL BY IMPLICATION OF PRIOR CONFLICTING LEGISLATION.—In 79 Cent. L. J. 331, we treated editorially, the question of repeal by implication, of prior statute in conflict with Negotiable Instruments Law. The case there considered a decision by West Virginia Court of Appeals, in which a gambling statute made void a negotiable instrument in the hands of an innocent holder for value, where the debt it represented was for gambling. It was held there was no repeal.

The Supreme Court of Iowa makes the same holding as to a usury statute which provides that the note is void even in the hands of such a holder. Perry Savings Bank v. Fitzgerald, 149 N. W. 497.

The Iowa court describes the negotiable instruments law as "a comprehensive piece of

ertheless, upon the principle of repeal by implication not being favored, it holds that the usury statute as regards such a holder has not been repealed.

We greatly regret, for the reasons stated in our editorial above alluded to, the disposition of one other court to treat an act intended to be construed uniformly in all the states, as if it were ordinary legislation. Uniformity being the keynote of legislative intention, all rules of construction should be made to bend thereto.

A SUCCINCT ANALYSIS OF THE CLAYTON ANTI-TRUST ACT.

Since the period known as that of the Reconstruction, our national commercial activity has developed by leaps and bounds. Railroads have been built, municipal communities established, deserts have been made to blossom like the rose and national wealth has increased until to-day the United States stands in the forefront, both commercially and otherwise, as one of the world powers. With this increase of wealth and improved transportation facilities came the corporate form of capital investment and control, a convenient and necessary method of conducting large enterprises which has so rapidly grown in favor and familiarity that to-day the amount of corporate capitalization is no longer a matter of more than casual comment. Gradually, however, there has developed along with this tremendous commercial prosperity and increased wealth an impression, more or less well founded, that this enormous development of corporate organization and the facility for combination which such organizations afforded, were likely to be used, and were in fact, in certain instances, being used to oppress individuals and injure the body politic. Thus came into being the "trust" question and the ever-increasing problem of how best to regulate and control this sentiments finally crystallized in the Sherman Anti-Trust Act of July 2, 1890, which was the first concrete legislation upon the subject.

Doubtless no single piece of legislation, either state or federal, has ever been more prolific of litigation than the Sherman Act. Lawyers, as a whole, should arise and call it blessed, for "it has filled the hungry with good things, and the rich it has sent empty away." The first federal statute of its kind, it has occupied the attention of the courts, both trial and appellate, in large measure almost from its very enactment. Two hundred and seventy written decisions are a mute but efficient testimony to the multitudinous legal questions embodied within its eight sections and involving its constitutionality and interpretation; and the end is not yet in sight, since the "rule of reason" announced by the United States Supreme Court in the recent Standard Oil case has opened wider the door for further inquiry and controversy as to what constitutes a "good trust or a bad one," and what is a "reasonable restraint of trade."

The Sherman Act made no attempt to define "commerce"; it related to interstate and foreign commerce only, and, in substance, declared every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade, illegal, and provided a penalty for violations of said Act in the way of a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both, in the discretion of the court. Not only so, but the courts, by a long line of decisions, beginning with United States v. Jellico Mountain Coal & Coke Co., 46 Fed. Rep 432, decided June 4, 1891, and ending with the decision of the United States Supreme Court in the Standard Oil Company case, decided May 15, 1911 (221 U. S. 63) uniformly held the act to apply to all contracts in restraint of trade, whether such restraint could be regarded as reasonable at common law or not. In the Standard Oil case, however, the United States Supreme Court modified its prior rulings, by declaring that "The statute * * * evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not *unduly* restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an *undue restraint*." (Standard Oil Co. v. U. S., 221 U. S., 60). Thus, again, after more than twenty years' refusal so to hold, has the door been opened wide by the court of last resort, for legal inquiry as to what constitutes a "reasonable restraint of trade" and thus has arisen, Phoenix-like from the ashes of like contentions long denied, the "rule of reason" concerning which, both favorably and otherwise, so much has recently been said.

This brings us to a consideration of the present Clayton Act. It consists of twenty-six sections, was approved October 15, 1914. and is not to be confused with the Federal Trade Commission Act, an entirely separate and distinct piece of Congressional legislation. The Clayton Act applies only to interstate commerce, and primarily deals with (1) unjust trade discriminations; (2) sales or leases conditioned upon exclusive handling by vendee or lessee of vendor's or lessor's goods, wares and merchandise; (3) the exemption of labor and labor unions from federal regulation and control; (4) corporate acquisition of capital stock of other corporations; (5) interlocking corporate directorates; (6) regulation of bids between corporations for materials and supplies; and (7) the issuance of injunctions and restraining orders in the observance and enforcement of the above matters:

As used in the Act, commerce is for the first time formally defined as trade or commerce among the states, territories, District of Columbia, foreign nations or insular possessions or other places under the jurisdiction of the United States, except the Philippine Islands.

(1) A merchant engaged in interstate commerce must not discriminate among his customers, either directly or indirectly, in the price of his wares, when the effect of such discrimination will be to substantially lessen competition or tend to create a monopoly. As is now the law affecting common carriers, the interstate merchant must from this time forward, treat all customers alike and in all cases, except as hereinafter stated. If he does so discriminate, either by rebate, reduction in price, or otherwise, he may be sued by any injured party not so favored, either in the district where such offending merchant resides, or is found, or has an agent, and the plaintiff may recover treble damages, court costs, and a reasonable attorney's fees. It is permissible, however, to make concessions in price on account of grade, quality, quantity, difference in cost of selling or transportation, or in order to meet bona fide competition in the same or different communities. What this section of the act denounces is the arbitrary and excessive price discrimination whereby large corporations haxe exterminated their smaller competitors. For instance, it is now illegal for a manufacturer or business concern to abnormally reduce the price of their goods in a given territory solely for the purpose of driving out a competitor for trade in that region. A person, however, is not obliged to accept all orders, but he may, in good faith, select his own customers. But a provision in a bill of sale or lease of goods, wares. merchandise or machinery to the effect that the lessee or vendee shall not use or deal in the goods of a competitor, is illegal and void, and the party inserting such provision in such contract, will be subject to the same penalties as those last hereinabove mentioned. This prohibition applies to a patented as well as unpatented articles.

(3) Labor, agricultural or horticultural organizations, instituted for purposes of mutual help and having no capital stock, are expressly exempted from the operation of all anti-trust laws, and "shall not be held or construed to be illegal combinations or conspiracies in restraint of trade." Such organizations may no longer be enjoined by legal process from strikes or boycotts, and neither of said acts, in the absence of overt acts of violence, constitute violations of any laws of the United States. This is a distinct departure from the prior law, and precludes relief from federal courts, by way of injunctions, in matters of strikes, lockouts and other labor troubles.

(4) If the purchase by one business corporation of the whole or any part of the capital stock of another results, or is likely to result, in a substantial lessening of competition between them, or in a restraint of trade in that locality, or tends to create a monopoly, such purchase is forbidden, and if consummated, is illegal. And if the same results are likely to ensue, either through voting proxies or otherwise, neither may one corporation acquire the whole or any part of the capital stock of two or more corporations. This latter provision is aimed at voting trust agreements, and as at present advised, it would seem to render all such future agreements inoperative and void.

One business corporation engaged in interstate commerce may, however, for investment purposes only, acquire the whole or any part of the capital stock of another, and such purchase is not forbidden by the Clayton Act. Capital stock so acquired, however, cannot be voted by the purchaser or used in any manner whereby prior competition between said corporations may be substantially lessened or destroyed. Again, larger corporations frequently find it advisable to conduct certain phases or branches of their business through the medium of subsidiary corporations, the latter of which are to be owned and controlled by the former, and the organization of such corporations for the purposes above indicated, as well as the holding and voting by the parent corporation of their capital stock, are permissible.

A railroad or other common carrier may aid in the construction of branch or short lines when the latter are so located as to become feeders to its main line, and to that end may acquire any or all of the capital stock of such branch or feeder lines it may, also, in cases where there is no prior substantial competition between them, purchase and hold the whole or any part of the capital stock of such branch line already constructed by an independent company; and finally, said railroad or common carrier may extend any of its own lines by purchase of capital stock or otherwise acquiring an interest in any other common carrier, in all cases where no substantial competition existed or exists between them.

(5) Interlocking directorates between theretofore competitive business corporations are prohibited in manner as follows:

From and after October 15, 1916, "no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus and undivided profits aggregating more than $1,000,000,00 . . . if such corporations shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the anti-trust laws." The eligibility of a director hereunder is to be determined by the total amount of capital, surplus and undivided profits, exclusive of dividends paid to stockholders, at the end of the fiscal year next preceding the election of directors and said eligibility continues only from year to year.

If the deposits, capital stock, surplus and undivided profits of any national bank, banking association or trust company organized or operating under Congressional enactment exceed in the aggregate the sum of $5,000,000, no officer, director or employee thereof may, while so connected therewith, serve in like capacity on the board of, or be employed by, any other national bank or financial institution operating under national laws. Neither may any private banker or director of any state bank or trust company, whose deposits capital, surplus and undivided profits aggregate more than said above amount, be eligible for election to or employment by any bank, banking association or trust company doing business under the laws of the United States.

In all cities having a population of 200,000 or more, and except as to mutual savings banks and in cases where the entire capital stock of one bank is owned by stockholders in the other, no national bank, banking association or trust company operating under federal laws "shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place." Neither of these provisions, however, apply to Class A directors of federal reserve banks, and their application is postponed until two years hence, to-wit, October 15, 1916.

A few concrete illustrations of the foregoing paragraphs may not be amiss: For instance, *A*, a director of one corporation, cannot at the same time be a director of one or more competitors, if the capital stock, surplus and undivided profits of each corporation exceeds $1,000,000.

B, who is at present either officer, director or employee of a national bank or other financial institution organized or operating under the laws of the United States, and *C*, who is either a private banker or a member of the board of any state bank or trust company, cannot serve as officer, director or employee of any other banking concern *anywhere* which is organized under the laws of the United States, if the deposits, capital, surplus and undivided profits of each institution exceeds $5,000,000.

D, now either a private banker, or a present director, officer or employe of any bank or trust company located in any city of more than 200,000 inhabitants, is absolutely prohibited from employment either as officer, director or employe by any other bank, banking association or trust company located in the same place.

But *E*, a director in a million dollar dry goods corporation, or serving in like capacity in a banking house, state or federal, the capital stock of which exceeds $5,000,000, is not precluded from becoming a director of another corporation, located in a city like St. Louis or elsewhere, but engaged in an entirely different and non-competitive business. The exemptions heretofore noted affecting mutual savings banks and Class A directors of Federal Reserve Banks are self-explanatory, and require no specific illustration.

But the inquiry necessarily arises: Suppose the foregoing provisions of the act are violated? What liability ensues—who is punishable, and to what extent? Section 14 of the Clayton Act imposes in general terms upon any director, officer or agent of the offending corporation a fine not exceeding $5,000 or imprisonment not exceeding one year, or both in the discretion of the court, for a violation of any of the *penal provisions* of the anti-trust laws. The sections affecting the eligibility and powers of corporate directors last above referred to contain no penal provisions and are absolutely silent in reference thereto. It necessarily follows, in the light of this apparent legislative oversight, that none of the acts above denounced, even if committed, constitute penal offenses under the anti-trust laws, and the offender therefore escapes any criminal liability. Undoubtedly the individual so illegally holding office may be ousted therefrom in civil proceedings, but no criminal prosecution therefor will lie.

(6) The provisions of the Act affecting common carriers and prescribing the circumstances under which they must receive bids for securities, supplies and other articles of commerce, or make or have contracts for construction or maintenance of any kind, are slightly drastic and severe. As between the carrier and any other corporation, firm, partnership or association with whom it is about to have such dealings, if the purchases or contracts to be made are in excess of $50,000 for any one year, and if the carrier shall have on its board of directors, or as its president, manager, purchasing or selling agent, or agent in the particular transaction, any person who is at the same time also a director, manager, purchasing or selling agent of the other concern, or has any substantial interest therein—such purchases or dealings cannot be had or contracts made, other than by competitive bids submitted under regulations to be prepared by the Interstate Commerce Commission. All bids must disclose the name and address of each individual bidder; or the names and addresses of the officers, directors and general managers, if a corporation, and the names and addresses of all firm members, if a partnership or firm. This information, together with a full and detailed statement of the transaction or purchase, and showing the manner of bidding, must be filed by the carrier with the Interstate Commerce Commission thereafter and within thirty days. If the carrier fails to comply with these requirements, it shall be subject to a fine not exceeding $25,000; and every director, agent, manager or officer thereof, who shall have knowingly participated in such violation, either by vote or otherwise, and any person who shall directly or indirectly influence or attempt to influence such bidding, may be fined not exceeding $5,000, or imprisoned in jail not exceeding one year, or both, in the discretion of the court.

For example, a director of a railroad company is, at the same time, a director of a railway supply corporation, from whom said railroad is about to purchase rolling stock or other supplies for the ensuing year. If the aggregate purchase price exceeds $50,000, such purchase by the railroad from the supply company cannot be made, except on competitive bids, wherein the railway supply company is the actual lowest bidder. If such purchase be made by said railroad company from said railway supply company without such bids, the railroad company may be fined $25,000, and every director, officer, manager or agent of the carrier who knowingly acted in the premises, will be subject to a maximum fine of $5,000, or imprisonment in jail for one year.

(7) In all cases arising under the anti-trust laws, as provided by the Clayton Act, other than proceedings instituted by the United States thereunder, the original complaints are to be lodged with the Interstate Commerce Commission, the Federal Reserve Board or the Federal Trade Commission, according as the defendant may be either respectively a common carrier, a national bank, trust company or banking association operating under national banking laws, or a corporation or individual engaged in general business. The service of the complaint, which is to be in writing, may be either personal, substituted or by mail, and process thereon is made returnable at the end of thirty days. The defendant then appears, either in person or by counsel, and the matter proceeds to final hearing. All findings of fact by the commission are conclusive, and if an adverse ruling is made, the commission before whom the matter is pending, enters its order requiring the defendant, within a time certain, to cease and desist from further violations of the anti-trust laws. If, at the expiration of this period said order has not been complied with, said commission then certifies the entire record, consisting of the pleadings, testimony and finding, to the United States Circuit Court of Appeals for the proper circuit, wherein the action of the commission may be reviewed and the order complained of finally affirmed, modified or set aside.

General equitable relief by way of injunction may also be granted to any person, firm, corporation or association by any federal court having jurisdiction of the parties, against threatened loss or damage from any violation of the anti-trust laws, except as against common carriers in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission.

This, in brief, is the Clayton Act, and a succinct analysis of its essential provisions. Its efficacy and efficiency will largely depend upon the manner in which the several commissions charged with its administration, exercise their jurisdiction. Interstate business, like interstate commerce, is now for the first time in this country, subject to national regulation and control, and many of our railroad friends may now smile at their business colleagues and say, "How do you like it?" It is always to be borne in mind, however, that except as to the specific prohibitions affecting national banks and common carriers, none of the acts or things forbidden by the Clayton Bill, violate this new anti-trust law, unless the effect thereof will be to "substantially lessen competition or tend to create a monopoly in any line of commerce." This all important qualification necessitates a careful investigation of the facts in each case, and to use a homely but trite expression, "every tub must stand on its own bottom." No definite sign-post marks the way, and much is left to doubt and uncertainty. But this can never be avoided. Rarely, if ever, can statutes of this character be expressed in terms sufficiently specific as to render their application in border-line cases free from ambiguity. Yet the "rule of reason," if intelligently and conservatively applied, will ultimately clarify and remove all such complexities, and afford a safe and sane guide for the interpretation and construction of the Act.

BYRON F. BABBITT.

St. Louis, Mo.

NEGLIGENCE—INVITEE.

JEWISON v. DIEUDONNE, et al.

Supreme Court of Minnesota. Oct. 16, 1914.

149 N. W. 20.

(Syllabus by the Court.)

Where there is a holding out of a partnership relation concerning the control of a place where business is transacted, and an invitation extended, under such circumstances of publicity as to warrant the inference that a person subsequently injured therein through the negligence of an employe of those in charge must have had the right to believe that those extending the invitation were in control of the premises, a recovery may be had without regard to the actual existence of the partnership relation; liability in such case, however, depending, not wholly upon the doctrine of estoppel, nor that of respondeat superior, but upon the assumption of a definite status with reference to the property and a specific relation to the person injured, to which the law attaches direct and positive duties.

PHILIP E. BROWN, J. Action against defendants Dieudonne, as partners, and defendant Nyquist, as their alleged employe, to recover damages for personal injuries claimed to have been caused by the latter's negligence while plaintiff was in a shop conducted under the firm name of E. Dieudonne & Son. A verdict was returned against all defendants, and each of them appealed from an order denying their applications for judgment, notwithstanding or for a new trial.

The accident occurred in the village of Janesville, in the afternoon of September 5, 1912. It is undisputed that in 1885 defendant Emil Dieudonne, to whom we will hereafter refer by his Christian name, opened a farm implement business on his own account and under his name, in the village mentioned, and so continued to operate it until 1900, in which year his son, Eugene, became of age and was associated with him therein; the firm thereafter being so conducted for the period of five years, under the name of E. Dieudonne & Son. Defendants claim that in 1905 this partnership was dissolved by Emil's withdrawal, the son continuing the business alone, and that since then the father has had no interest in the same, except as a creditor, and has taken no part in its management. It was lot 140 feet deep, extending back to a 20-foot unpaved, ungraded, littered alley bisecting the block. Up to 1910 it had been used entirely for the sale and exhibition of farm machinery, having an office in front and a board floor, on a level with the sidewalk, running back its entire length. After the alleged dissolution and prior to 1910, the business of repairing automobiles was conducted in the rear part, and in the latter year all the board floor except about 37 feet in front was taken out, the level lowered 2½ feet, and a cement floor substituted. The rise between the two floors was not boarded up, and there were no permanent steps connecting them; a movable step, consisting of boxes, being used for this purpose, and being shoved under the board floor when space was needed. The area of the cement floor was divided into two compartments, one used as a garage and the other as a repair shop, with an entrance through a door opening to the rear. Nothing was kept for sale in these compartments, nor was either fitted up for the reception of customers, and the workmen there employed were engaged solely in repairing automobiles. Adjoining the office articles were kept for exhibition, including repairs for machinery. On the day of the accident, plaintiff, a farmer residing near Janesville, entered the building through the rear door for the purpose of exchanging some mower repairs he had obtained on the previous day. Defendant Nyquist, an employe in the repair shop, was then engaged in the garage in repairing a defective automobile belonging to defendant Eugene, and as plaintiff was about to enter he backed the machine out through the door, noticing plaintiff and another man enter just after he came out. Stopping the automobile outside the entrance, but leaving the motor running very fast and without applying the brakes, on the supposition that the machine was not in gear, but not in fact knowing where the defect was, he proceeded with his work. He then stepped into the car, and as he did so it started to move forward, and, not being under control, ran into the garage. Plaintiff, who at this time was passing through the rear of the building in order to reach the office, was struck by the machine when near the temporary step and injured. He was familiar with the premises and their uses, and he and others had is entitled to recover against any of them. We have set out the location and details with reference to the construction and use of the building, because these matters were elaborately covered by the testimony given on the trial, and are also relied upon to establish the point mentioned. But it clearly appears that the building was such as is ordinarily used in the villages of the state for exhibition of farm implements and automobile repairs, and taking into consideration the business transacted in it, its location, and the use made by patrons of the rear door, we cannot say that a customer like plaintiff, when entering from the rear, would have no better standing than a bare licensee. The fact that the alley was unimproved and strewn with rubbish, such as is usually found in such places, is not of importance; for farmers, who of necessity are often confronted with such conditions, would naturally be frequent customers of the business conducted in the front of the building, and the persons in charge must have known that the condition of the alley would not, and did not, prevent them from using the rear entrance when more convenient than the front. Plaintiff was entitled to the rights of one who comes upon the premises of another by invitation. We find no reversible error in the instructions in this regard.

[2, 3] 2. The further claim that, as a matter of law, defendant Nyquist's negligence was not established, and that plaintiff should be held to have been negligent, are not sustained. We deem the recital of the facts stated concerning the manner in which the automobile was handled a sufficient refutation of the first, and the question of plaintiff's negligence was so plainly for the jury that the second does not merit discussion.

[4] 3. Defendants also contend that, because the Dieudonnes are sued as partners, unless such relationship was established, no recovery can be sustained against any of defendants. Tort-feasors, however, are jointly and severally liable, and G. S. 1913, § 7897, provides that:

> "When two or more are sued as joint defendants, and the plaintiff fails to prove a joint cause of action against all, judgment may be given against those as to whom the cause of action is proved."

See Miles v. Wann, 27 Minn. 56, 6 N. W. 417; Huot v. Wise, 27 Minn. 68, 6 N. W. 425; Fryklund v. Great Northern Ry. Co., 101 Minn. 37, 111 N. W. 727.

[5] 4. The complaint, in addition to alleging that defendants Dieudonne were copartners, charged that they conducted their business in the building wherein the accident occurred, and had done so for a long time previous thereto, inviting plaintiff to come there and trade, and that plaintiff had for a long time been a customer, entering their place of business under such invitation for the purpose of trading; and defendants admitted that subsequently to the alleged dissolution of the partnership the business was continued under the same firm name, this being admitted by Emil in order to give his son credit, and that with his knowledge and without protest advertisements over the name "E. Dieudonne & Son" were thereafter published in a newspaper of the village, soliciting patronage. Furthermore, it appeared that plaintiff had, for a number of years both before and after the dissolution, been a customer of the business, and no proof was made that he had notice or knowledge of the dissolution. But the court, nevertheless, held and charged that plaintiff could recover only in case an actual partnership relation existed, and defendants insist that the evidence does not warrant a finding of such, and, further, that, this being an action in tort, the instruction given by the court was correct. We sustain defendants' first claim, and hold the evidence insufficient to establish a partnership. This conclusion necessitates consideration of the second contention as to the correctness of the instruction. It has long been settled that a merchant who keeps his place of business open to customers, and invites and permits them to enter therein to trade, owes them the duty of exercising reasonable care to keep the premises safe for their ingress, progress and egress. Corrigan v. Elsinger, 81 Minn. 42, 83 N. W. 492. Under this rule, if the alleged partnership had been established, Emil's liability would be clear. The rule, however, has been further developed, and in the case cited it was held that this duty was nondelegable, and could not be shifted upon a contractor engaged in making repairs, whose negligence caused the accident. In Mastad v. Swedish Brethren, 83 Minn. 40, 85 N. W. 913, 53 L. R. A. 803, 85 Am. St. Rep. 446, it was held that a person having the management and control of a public place of amusement, which he invited the public to attend for pay, was bound to exercise reasonable care to protect his patrons from assaults and insults from one becoming intoxicated with liquor which he there sold him. In Thompson v. Lowell, etc., St. Ry. Co., 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323, a street railway company was held liable for an injury to a spectator by reason of the negligent management of a stage exhibition at a pleasure resort owned by it and on its lines, though the exhibition was conducted exclusively by

an independent contractor, hired by the company for that purpose, and though the latter was not interested in the performance or its management, except in so far as patrons were induced, through its advertisements, to use its line in reaching the place of amusement. See, also, Richmond, etc., R. Co. v. Moore, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258.

Considering the rule as applied in the cases cited, to which many others of like effect might be added, what is its underlying motive? Does liability result because of ownership or actual occupation or management, or does it flow from the invitation extended to the public by one who has clothed himself with every indicia of the right to extend the same, coupled with apparent ownership or control? Defendants rely largely upon Smith v. Bailey, 2 Q. B. (1891) 403, and certain textbooks approving it, which criticizes and refuses to follow Stables v. Ely, 1 C. & P. 614, wherein it appears to have been held that one who allowed his cart to go out with his name on it held himself out to the world as liable for injuries occasioned by the negligence of anyone driving it. We agree with both the Smith case and the text authorities cited, which are sound in principle, but think they are not decisive of the present inquiry, if at all in point. In both the Smith and the Stables cases the accident happened on the highway, without the element of invitation and the duties incident thereto. In cases like the present one the gist of liability lies in the invitation, when extended under the circumstances indicated in the question. It does not rest wholly in estoppel, but upon the assumption of a definite status—of control or ownership—with reference to the property, and a specific relation—involved in the invitation—towards the person injured, neither of which the defendants here attempt to deny. Nor, as we have seen, does it depend upon the doctrine of respondeat superior. See, also, Pollock on Torts (8th Ed.) 74, 75. Where, as in this case, there is a holding out of a partnership relation concerning the control of a place where business is transacted and an invitation to patronize extended under such circumstances of publicity as to warrant the inference that a person subsequently injured therein through failure to exercise due care for his safety must have had the right to believe that those extending the invitation were in control of the premises, liability results without regard to the existence of the partnership relation. Any other rule would enable those who have allowed invitations to be extended to the public in their names to escape liability for nonperformance of the duties they have thereby assumed by setting up ownership or control of the place in some irresponsible person.

The finding of the jury as to negligence and damages, when considered in connection with the undisputed facts, establish liability on the part of the defendant Emil, irrespective of the actual existence of the alleged copartnership, and there is nothing in the assignments of error showing sufficient prejudice to the rights of defendants to render this conclusion unjust. Hence the order is affirmed.

BUNN, J. I dissent from the proposition that Emil Dieudonne is liable in this case. It was necessary, in my opinion, to establish a partnership in fact, and this the evidence failed to do. There was a "holding out;" but my view is that this does not create a liability, under the facts here, either on the doctrine of estoppel or that of invitation. The fact that the firm name remained "E. Dieudonne & Son" had nothing to do with the happening of the accident to plaintiff. It does not appear that in going upon the premises, which were not inherently dangerous, plaintiff was relying upon the exercise of care on the part of the elder Dieudonne. The doctrine of invitation, upon which the majority opinion predicates liability, has no application in my opinion, where the party sought to be held is not in fact in possession or control of the premises.

Note.—*Liability of Reputed, But Not Actual, Partner, for Tortious Acts of Partnership.*—The instant case, it is perceived, partly goes upon the theory of estoppel, so the court says, but it is hard to see from what is said that its ruling of liability rests upon any other ground. We do not consider in this note any cases in contract or those in tort where any benefit was received by an alleged member of a partnership, or where there was individual notice to one injured by a tort of non-existence of partnership relation. The court says here there was a holding-out of a partnership relation concerning the control of a place where business is transacted and an invitation extended," etc., and on that liability is predicated. If that is not estoppel pure and simple we fail to understand what may amount to estoppel.

In contract cases there is a presumption—independent of any statute—that promisee relies on status. In tort cases why should there be any such presumption? One does not incur danger from negligence deliberately, or he will be barred all recovery.

And it is easily perceived that such a case as Thompson v. Lowell, etc. St. Ry. Co., 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323, does not cover what is necessary in a case of this kind. That admits interest of the railroad in the management of the business where the injury occurred, and the independent contractor was acting under its authority. To exactly the same effect is the case of Richmond, etc. Ry. Co. v. Moore, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258. The railroads in these cases actively, and not passively, held out invitation to the public to visit the grounds upon which injury occurred.

There is the case of Shepard v. Hynes, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675, a unanimous opinion by Circuit Court of Appeals, in which the opinion was written by Thayer, C. J., where the identical question in the instant case was involved, and which reached closer to establishing liability than does the instant case, and was decided the other way. This case showed wrongful attachment by a partnership which had been dissolved but no notice of dissolution given. The same name was continued to be used after dissolution as before. The instructions of the trial court called the attention of the jury to the evidence which showed the parties had once been partners; that some people knew the retiring partner was a member of the firm; that it was secretly dissolved; that the business was conducted in the old firm name and that Moore must be regarded as a partner of Shepard, and liable for all of his tortious acts in conducting the firm business.

Judge Thayer said: "We are of opinion that this view was erroneous, because the object of the suit was not to charge Moore with a contractual liability to someone with whom the firm had formerly dealt, but to make him respond for a willful tort said to have been committed by Shepard. In such an action it was necessary for the plaintiffs to show that the relation of partners actually existed between them." * * * The court erred in forcing Moore into the position of a partner, by erecting an estoppel and then holding him accountable for the acts of Shepard, as if the relation of partners actually existed."

In Lindley on Partnership, 7th Ed., p. 78, it is laid down broadly that the doctrine of holding out only applies in favor of persons who have dealt with a firm on the faith that the person whom they seek to make liable is a member of it, and "it has no application to action of tort arising from the negligent conduct of a firm where no trust has been put in it."

In Sherrod v. Langdon, 21 Iowa 518, it was said that where one participated in the sale of sheep and so held himself out to the purchaser as to make him believe he was a partner, and the purchaser relied on his representations, he would be held as a partner, but that is not such a case as this. Maxwell v. Gibbs, 32 Iowa 32, is upon the same theory.

As showing how narrow is the rule of holding-out making one responsible as a partner, *vide* Thompson v. First Natl. Bank, 111 U. S. 529, which says that Poillon v. Seeor, 61 N. Y. 456, which held a holding-out partner liable to a customer on account, though such relied in no way on the holding-out, is the only American case sustaining such a doctrine.

In Bates on Partnership, § 102, it is said: "Liability arising from holding-out is not confined to actions on contract, but may arise in torts, as for deceit and false warranty in a sale of sheep, in which sale defendant participated or for damages to a horse and buggy let to the supposed firm." It is seen these things all have a certain relation to contract—cases in which the tort might have been waived and suit brought on the contract.

The point often may not arise, but that the majority opinion in the instant case is wrong seems clear, for the simple reason that the invitee could not have relied on such holding-out.

C.

ITEMS OF PROFESSIONAL INTEREST.

LOUIS D. BRANDEIS, THE APOSTLE OF EFFICIENCY IN THE MANAGEMENT OF PUBLIC SERVICE CORPORATIONS.

The charge that the legal profession is controlled by "big business" and is out of touch with the people has been often disproven. But a living example of the error in such a charge against the profession is to be found in the career of such a lawyer as Louis D. Brandeis, of Boston, whose picture appears on our cover page.

Some time in June, 1910, the railroads of the United States, operating east of the Mississippi and north of the Ohio and Potomac rivers, acting in pursuance of a common purpose, filed with the Interstate Commerce Commission new tariffs providing for large advances in freight rates. The commission ordered a public investigation as to the justice and reasonableness of the proposed increased rates, and meanwhile suspended the operation of the new tariffs. The investigation occupied about six months.

In this investigation Mr. Louis D. Brandeis acted as counsel for the Traffic Committee of the trade organizations of the Atlantic seaboard.

The railroads sought to justify the increased rates on the ground that they needed greater net income, and asserted that this need was due to increased operating costs, resulting mainly from higher wages. They contended that increased rates were imperative because the possibilities of economies in the operation of railroads had been practically exhausted.

Mr. Brandeis opposed the proposed advance on several grounds; but that which attracted most attention was his contention that there still existed in railroad operation huge possibilities of economies which could be attained by the introduction of scientific management—economies aggregating on all the American railroads "at least a million dollars a day."

Since this time Mr. Brandeis has appeared frequently before the courts, before state legislatures, before the Interstate Commerce Commission and before committees of Congress, almost always in the attitude of opposition to the demands of big business, and in the interest of associated groups of business men and citizens' committees. The brief of Mr. Brandeis before the Interstate Commerce Commission has been published by the Engineering Magazine, of New York, under the title

Jan 21, 1915

of, "Scientific Management of Railroads." Other works of Mr. Brandeis are ,"Business, a Profession," and "Other People's Money."

Mr. Brandeis is not a political agitator, long on talk and short on ideas. He is a constructionist, a philosopher and a practical scientist on matters of business management. His acute intellect has compelled the captains of industry and of big business to acknowledge the justice and truth of his conclusions. He is to-day the greatest obstacle to the success of the railroads' propaganda for higher freight rates. Not because he is a demagogue—railroads are not afraid of them—but because, by his keen reasoning, he has proven that by more scientific management the railroads could save enough every year to enable them to make handsome profits on lower rates than are charged to-day.

There is opening a wide field of usefulness, as well as of profit, for lawyers in appearing for associated committees of citizens before the public service commissions of our large cities and of some of the states. The new Federal Trade Commission still further enlarges the circle of possibilities of this field of legal endeavor. With the entrance of many of the best legal minds of the country into this field of usefulness, the popular delusion concerning the subsidization of the American bar will have wholly passed away.

A. H. ROBBINS.

CORRESPONDENCE.

LAW GIVING SUPREME COURT POWER TO REVIEW DECISIONS OF STATE INSURANCE INVALIDATING STATE LAWS AS CONTRARY TO FEDERAL CONSTITUTION.

Editor Central Law Journal:

Your readers will be interested to know that a bill recommended by the American Bar Association for two successive years has passed both Houses of Congress and was approved by the President on the 23rd of December.

This bill gives to the Supreme Court the right to grant a certiorari to review the decision of the highest court of a state against the

HUMOR OF THE LAW.

Judge—You say you are suing this man because he did not blow his horn before he ran into you.

Plaintiff—I didn't say he didn't blow his horn. I said that I couldn't hear it. His blamed old car rattled too much.

The Income Tax Commissioners recently wrote to a business man pointing out that they were not satisfied with the amount he had set down as his income. "Dear Sirs," was his courteous answer: "You are not half so dissatisfied as I am!"

"William," asked the judge's wife, "did you get the spool of silk thread I ordered you to bring home yesterday?"

"No, my dear, I did not."

"Dear me, how provoking! Be sure to get it to-day."

"I'm sorry, but I cannot do so."

"Why, not, I'd like to know?"

"I have looked through all the books and I have been unable to find a precedent that would warrant me in taking such action."

A witness in a trial in Ohio not long ago had been kept on the stand for some time. Naturally he was getting a little weary of the proceedings.

"If," said the cross-examiner, noticing the witness' irritability, "you would only answer my questions properly, there would be no difficulty. If I could only get you to understand that all I want to know is what you know, we—"

"It would take you a lifetime to acquire that," snapped the witness.

The lawyer scowled. "What I mean is that I merely want to learn what you know about this matter. I don't care anything about your abstract knowledge of law or your information in regard to other matters, but what you know about this case."

"Oh, that isn't what you want," said the witness. "I've tried to give you that for some time, and—"

Whereupon the lawyer interposed objection, and witness was obliged to cease.

"If I don't want to know what you know about this particular case and nothing else,"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Account Stated**—Defined.—It is the consent of the debtor that imparts the character of an account stated to an account; and the parties may agree as to the items on one side and leave the items on the other open for settlement.—Godfrey v. Hughes & Hall, Ark., 169 S. W. 958.

2. **Adverse Possession**—Color of Title.—Where the deed, under which defendant claimed, included the land in controversy by specific description, though an additonal description referred to the property as the Jones land, a tract which did not include the land in controversy, it constitutes color of title for defendant's possession of the property in dispute.—John L. Roper Lumber Co. v. McGowan, N. C., 83 S. E. 8.

3.——Evidence.—Mere acts of trespass, such as cutting timber, taking coal and planting two or three crops during a period of 20 years, are insufficient to establish adverse possession.—Smith v. Chapman, Ky., 169 S. W. 834.

4. **Animals**—Bailment.—One who furnishes the service of a male animal for breeding purposes is held to ordinary care to prevent injury.—Cotton v. Ingram, Ark., 169 S. W. 967.

5.——Domestic.—A cat is a domestic animal within Pub. Laws 1909, c. 222, § 17, authorizing the killing of dogs found worrying, wounding, or kiling any domestic animal.—Thurston v. Carter, Me., 92 Atl. 295.

6. **Arrest**—Suspicion.—Arrest without a warrant, because the officer suspected that accused had intoxicating liquor in his suit case, was unjustifiable.—Caffini v. Hermann, Me., 91 Atl. 1009.

7. **Assault and Battery**—Justification.—That plaintiff, to mislead an officer, deliberately created circumstances arousing his suspicion, and that the officer was thereby misled and became suspicious, and under such circumstances assaulted or arrested plaintiff, to ascertain if intoxicating liquors were being carried in his suit case, held not to defeat a recovery.—Caffini v. Harmann, Me., 91 Atl. 1009.

8. **Assignments for Benefit of Creditors**—Special Deposit.—There is an equitable right to follow a special deposit or trust fund into the hands of an assignee for creditors as a claim superior to that of a general creditor under the assignment, though the deed of assignment fails

9.——Collecting Agent.—Where a bank receives a bill of lading as a collecting agent, it acquires no property right in the proceeds.—Elm City Lumber Co. v. Childerhose & Pratt, N. C., 83 S. E. 22.

10.——Debtor and Creditor.—Where parties intend that title to paper deposited in a bank shall pass to the bank, that the bank is understood to have a right to charge the amount back if it shall prove uncollectable will not change the relation of debtor and creditor.—First National Bank of Fayetteville, Tenn., v. McMillan Bros., Ga., 83 S. E. 149.

11.——Duty of Inquiry.—A draft issued by a village bank was payable to the order of the defendant bank put defendant on inquiry as to the ownership of the proceeds before paying same to the person presenting the draft.—Bjorgo v. First Nat. Bank of Emmons, Minn., 149 N. W. 3.

12.——Insolvency.—Where a bank incurs a debt on the basis of stock subscribed, the subscriber cannot, after insolvency of the bank, obtain relief for fraudulent representations in the securing of his subscription.—Wilkes v. Knight, Ga., 83 S. E. 89.

13.——Stockholder Liability.—Where either the transferror or the transferee of stock in a state bank has been compelled to pay any money on account of the statutory liability of stockholders, which the other in good faith should have paid, he may look to such other for payment.—Robinson-Pettit Co. v. Sapp, Ky., 169 S. W. 869.

14. **Bills and Notes**—Notice.—That a purchaser before maturity of a note detached from a contract knew that the contract empowered the payee to detach the note did not bring home to him knowledge of any fraud practiced on the maker at the time of the making of the contract and note.—Pratt v. Rounds, Ky., 169 S. W. 848.

15. **Boundaries**—Evidence. — The relative weight to be given evidence of disputed boundaries ranks as follows: (1) Natural boundaries; (2) artificial marks; (3) course and distance. But this rule is not absolute, and may be changed by the special circumstances in the case.—Southern Realty & Inv. Co. v. Kennan, S. C., 83 S. E. 39.

16.——Natural Monuments.—Where natural monuments referred to in the description can be found, they fix the boundary, though they correspond neither with the courses and distances nor with the quantity of land in the same description.—Miles Land Co. v. Hudson Coal Co., Pa., 91 Atl. 1061.

17. **Brokers**—Commission.—Where an applicant for a loan wrote the agent that he had procured the loan elsewhere, to which the agent replied that that was satisfactory provided the applicant made another loan through him in the future, but later the agent's company refused to make the later loan, the agent could not recover commission for the former loan.—Stogsdill v. Holmes, Ark., 169 S. W. 961.

18. **Cancellation of Instruments**—Pleading.—While defendant, in an action to cancel a deed on the ground of fraud, cannot plead plaintiff's fraud to defeat a recovery, yet, where he has paid out money by reason of plaintiff's fraud, he may plead that fact and have it adjudicated in case a rescission is decreed.—Paschal v. Hudson, Tex., 169 S. W. 911.

19. **Carriers of Goods**—Estoppel.—An initial carrier is estopped as against an innocent purchaser of goods, to deny that the shipment did not include all the goods called for by the bill of lading.—Palmetto Fertilizer Co. v. Columbia, N. & L. Ry. Co., S. C., 83 S. E. 36.

20.——Rates.—Where a carrier has filed interstate rates graduated according to value of the articles shipped, the shipper's valuation and to require a redelivery.—Texas Midland R. R. v. Hargrove, Tex., 169 S. W. 925.

22.——Stipulation.—A stipulation which requires written notice to the delivering carrier of any claim for damages before the removal of the stock as a condition precedent to a recovery of damages is reasonable.—Duvall & Bell v. Norfolk-Southern Ry. Co., N. C., 83 S. E. 21.

23. **Carriers of Passengers**—Contract. — A railroad station agent had no authority to contract for the transportation of a party of men to his station without receiving the full consideration for the transportation or arranging for its payment upon call for the tickets.—Cuozzo v. Maine Cent. R. Co., Me., 91 Atl. 1006.

24.——Transfers.—A municipality which has the power to prescribe in the franchise of a street railway company the maximum fare, also has the power to require the company to issue transfers.—City of Barre v. Barre & M. Traction & Power Co., Vt., 92 Atl. 237.

25. **Charities**—Accumulated Income.—Under will creating trust, income to be paid to hospital whenever fund amounted to $75,000, and authorizing payment of $25,000 of the principal to be used in building a hospital, held that, where hospital association, after the fund reached such sum, built a hospital, the trustees might pay such sum of $25,000 and the accumulated income.—Moore v. McKenzie, Me., 92 Atl. 296.

26. **Commerce**—Burden on.—That the train by which decedent was killed carried interstate passengers did not render the blow-post law (Civ Code 1910, §§ 2675-2677) void, as an unreasonable burden on interstate commerce.—Georgia R. & Banking Co. v. Auchinachie, Ga., 83 S. E. 127.

27.——Mental Anguish.—Kirby's Dig. § 7947, authorizing recovery for mental anguish for delay in delivering a death message, held inapplicable to a message sent from Arkansas to Oklahoma, where such was not the law, since to so apply it would be an invalid restriction on interstate commerce.—Western Union Telegraph Co. v. Compton, Ark., 169 S. W. 946.

28. **Constitutional Law**—Foreign Corporation.—Const. art. 12, § 11, held to apply only to corporations within the state in pursuance of its laws; and hence a foreign corporation, whose license had been revoked for the removal of a cause, under Act, May 13, 1907, could not set up the unconstitutionality of the act.—State v. Hodges, Ark., 169 S. W. 942.

29. **Corporations**—Capitalizing Assets.—Capitalization of the assets of a corporation on the basis of earnings of the preceding year, when there was nothing to show that such earnings would not probably be increased, was not an overcapitalization, so as to justify an assessment against stockholders on the corporation's subsequent insolvency.—Railway Review v. Groff Drill & Machine Tool Co., N. J., 91 Atl. 1021.

30.——Unissued Shares.—A corporation may pledge its unissued shares as collateral for a loan made to it, and when stock is so pledged the creditor may prove his debt against the corporation's receiver and return the stock.—In re International Radiator Co., Del., 92 Atl. 255.

31. **Courts**—Res Judicata.—A decision in an action brought under the state law that there could be no recovery for the death of a railroad employe because of his contributory negligence does not control in a subsequent action in the state court under the federal Employer's Liability Act.—Cincinnati, N. O. & T. P. Ry. Co. v. Swann's Adm'x, Ky., 169 S. W. 886.

32. **Criminal Evidence** — Impeachment. — Until a defendant offers evidence of his general reputation, to create an inference that he did not commit the crime charged, the state may not show his reputation for immorality, except to impeach him as a witness.—Combs v. Commonwealth, Ky., 169 S. W. 879.

33. **Criminal Law**—Custody of Jury.—Where

the relationship, if any, between deceased and the deputy.—Combs v. Commonwealth, Ky., 169 S. W. 879.

34. **Damages**—Special Damages.—Such damages as may be presumed to naturally and necessarily result from an injury need not be stated with any very great particularity, but damages which are not thus implied must be specially pleaded in order to apprise defendant of the facts intended to be proved.—Main Jellico Mountain Coal Co. v. Young, Ky., 169 S. W. 841.

35.——Special Damages.—The allegations of the items of damage in an action for breach of an implied warranty of goods sold should be specific as to stoppage of business and resulting loss.—John A. Roebling's Sons Co. v. Southern Power Co., Ga., 83 S. E. 138.

36. **Dead Bodies**—Property Right.—At common law there can be no property in a dead human body, but the right to its possession and disposition is a quasi property right which the courts will recognize and protect, and in the absence of any testamentary disposition, the right of preservation and burial belongs to the surviving husband or wife, or next of kin.—Floyd v. Atlantic Coast Line Ry. Co., N. C., 83 S. E. 12.

37. **Death**—Instructions.—An instruction, in a mother's action for the death of her son, directing the jury to capitalize the amount which she had a reasonable expectation of receiving from him during her life, was correct; the word "capitalize" meaning "to convert the periodical payments to a sum in hand."—Brown v. Erie R. Co., N. J., 91 Atl. 1023.

38.——Survival of Action.—Under the federal Employers' Liability Act, where an employe lives an appreciable time after his injury, his cause of action survives.—Capital Trust Co. v. Great Northern Ry. Co., Minn., 149 N. W. 14.

39. **Deeds**—Capacity of Grantor.—Neither old age, sickness, nor distress in mind or body incapacitates a grantor, who has possession of his mental faculties and understands the transaction in which he is engaged, from disposing of his property.—Crow v. Childress, Tex., 169 S. W. 927.

40.——Description.—On an issue whether a deed contained a particular 50-acre tract patented by the grantor, May 29, 1855, the particular description being unintelligible, the court would give controlling effect to a general statement that it was intended to convey such tract. Bain v. Tye, Ky., 169 S. W. 843.

41.——Pleading.—A petition which alleges that a stipulation was omitted from a deed executed by plaintiff, but which does not allege that the grantee agreed that the stipulation might be inserted, or that it was omitted by mutual mistake, is fatally defective as against a demurrer.—Crawford v. Dupriest, Ky., 169 S. W. 840.

42.——Subsequent Deed.—Where two parties purchased adjoining land from the same source, the description contained in the prior deed controls, since no subsequent deed from that source could deprive the prior grantee of any portion of the lands conveyed to him.—Southern Realty & Inv. Co. v. Keenan, S. C., 83 S. E. 39.

43. **Dower**—Consideration.—Where a husband induced his wife to enter into an agreement to accept in lieu of her dower and distributive rights a small share in his estate, the amount of which the husband had understated, the jointure agreement is invalid, there being no consideration to support it, as the jointure was less than the wife's statutory share.—Redwine's Ex'r v Redwine, Ky., 169 S. W. 864.

. 44. **Easements**—Visible Objects. — Where plaintiff purchased a parcel of land from defendant's grantor, and such parcel was supplied with water by a pipe running over the land retained by defendant's grantor, defendant took the property subject to plaintiff's easement of necessity, where the pipe was visible.

the right to use it did not pass an appurtenance. —Duvall v. Ridout, Md., 92 Atl. 209.

46. **Eminent Domain**—Bill of Rights.—Drainage Act, § 14, requiring the assessment of all damages unless waived, does not violate Bill of Rights, § 13, or Const. § 242, by taking without compensation property owned by those who cannot claim their damages because of legal disability.—Shaw v. Board of Drainage Com'rs of Daviess County, Ky., 169 S. W. 859.

47.——Usufructuary Interest.—The usufructuary interest of the lessee of the railroad belonging to the state is not subject to condemnation as an independent interest in land.—Western Union Telegraph Co. v. Western & A. R. Co., Ga., 83 S. E. 135.

48. **Estoppel**—Conversion.—Failure to make a claim in court for property which is being or about to be sold does not estop the owner from subsequently suing for its conversion.—Parks v. Hailey, Ga., 83 S. E. 100.

49.——Executors and Administrators.—Where the heirs frequently insisted that the administrator should settle the estate, and filed a petition to compel him to do so, they were not estopped to deny that they consented to the carrying on the business of the decedent, without settlement, and the use of the property as a common fund, because they used some of the proceeds of the estate.—Skelly v. Skelly, Vt., 92 Atl. 234.

50. **Evidence**—Admissibility.—Evidence that accused, a short time before he shot deceased, threatened the witness, and stated that he would as soon shoot his own father as any one else, is admissible to show accused's frame of mind at the time of the killing.—Combs v. Commonwealth, Ky., 169 S. W. 879.

51.——Incompetency.—In an action against deputy sheriff for assaulting person suspected of having liquor in his suit case, evidence as to other persons having transported liquor in suit cases, and as to the seizure of liquor so transported, held properly excluded.—Caffini v. Hermann, Me., 91 Atl. 1009.

52.——Materiality.—In the prosecution of one charged as accomplice to the murder of the husband of the woman with whom defendant had had illicit intercourse, evidence that the deceased's wife knew that her husband had visited houses of ill fame was not material, and was properly excluded.—Millner v. State, Tex., 169 S. W. 899.

53. **Exchange of Property**—Rescission.—A person, injured through misrepresentations as to the incumbrances on property for which he exchanges his property, may rescind.—Hamilton v. Duvall, Ga., 83 S. E. 103.

54. **Executors and Administrators**—Secured claim.—Presentation of a claim against insolvent estate, without notice to the commissioners of the security held by the creditor and the allowance of the claim, held not to deprive the creditor of her right to the security and to a dividend from the estate upon the excess of the debt.—Wagner v. Mutual Life Ins. Co. of New York, Conn., 91 Atl. 1012.

55.——Sham Sale.—While the right to have decreed void an executor's sale to himself, generally rests in the heirs, yet if the executor and legatees agree to a sham sale and purchase by the executor to defeat creditors of an heir, such creditors may attack the sale.—Webb v. Deadwyler, Ga., 83 S. E. 99.

56. **Fraud**—Intent.—It is not necessary to show that a party making fraudulent representations intended to perpetrate a fraud, but if they are such as to create a false impression, causing the other party to act believing them to be true, such representations are fraudulent.—Paschal v. Hudson, Tex., 169 S. W. 911.

57.——Reliance on Representations.—Where defendant asserts positively and as of his own knowledge that which he does not know, and it is in fact untrue, he will be liable to a person relying on his statement to his damage.—Rogers v. Rosenfeld, Wis., 149 N. W. 33.

58.——Variance.—There is a fatal variance between an allegation that defendant falsely represented that his agent had sold 100 copies of plaintiff's song and proof that defendant stated that he had received a letter to that effect, without proof that defendant had received no such letter.—Carter v. Orne, Me., 92 Atl. 289.

59. **Frauds, Statute of**—Original Promise.—Where seller of potatoes to K, who had contracted to furnish them to defendant, was told that if K did not pay for them defendant would, and the potatoes were then shipped to defendant, his promise was an original promise, within Rev. St., c. 113, § 1, par. 2.—Colbath v. Everett D. Clark Seed Co., Me., 91 Atl. 1007.

60.——Parol Agreement.—A promoter's parol agreement to repurchase stock from a subscriber, held unenforceable under Civ. Code 1910, § 3222.—Weatherly v. Cotter, Ga., 83 S. E. 104.

61. **Fraudulent Conveyances** — Evidence. — Where a grantor, having been sued, conveyed all his property to his father and mother and left the state, and judgment was recovered against him, a finding that the conveyance was fraudulent and voidable, as provided by Ky. St. § 1906, was proper.—Hale v. Proffitt, Ky., 169 S. W. 851.

62. **Guardian and Ward**—Foreign Guardian. —In a foreign guardian's proceeding for the transfer of property pursuant to Code 1913, (secs. 3981, 3983), the amount for which the resident guardian is liable need not be ascertained in advance of the entry of the order, nor need the court await the determination of other litigation involving the estate.—Fidelity Trust Co. v. Davis Trust Co., W. Va., 83 S. E. 59.

63.——Marriage of Ward.—Where another appointed a testamentary guardian for her infant son, she cannot, by a provision in her will, require the guardian, upon marriage of the son during infancy, to deliver him his estate.—Hudson's Guardian v. Hudson, Ky., 169 S. W. 891.

64. **Homicide**—Motive.—In the prosecution of one charged as accomplice to the murder of the husband of a woman with whom defendant admitted he had had illicit intercourse only a short time before the homicide, testimony that the intimacy had extended over several months, and that the defendant and the woman were desirous of marrying, was admissible to show motive.—Millner v. State, Tex., 169 S. W. 899.

65. **Husband and Wife**—Equity.—Loans by wife to husband and assignment of insurance policy by husband to wife to secure loans, when made in good faith, held enforceable in equity. —Wagner v. Mutual Life Ins. Co. of New York, Conn., 91 Atl. 1012.

66.——Estoppel.—Where a wife loaned plaintiff her separate funds, such debt was not affected by the fraud of her husband in inducing plaintiff to execute certain notes to him for the same amount on a promise to return to plaintiff the note he had executed to the wife.—Strader v. Strader, Ky., 169 S. W. 857.

67. **Infants**—Rescission.—A married woman who, while under the age of 21 years, sold and conveyed real estate, cannot rescind the sale on reaching her majority under Rev. St. c. 63, § 1, which is a condonation of earlier statutes relieving her from disability of infancy.—Fields v. Mitchell, Me., 92 Atl. 293.

68. **Injunction**—Cross-Bill.—In a suit to restrain continued trespass by a railroad company on land claimed by complainant, right of defendant to affirmative relief on its denial of complainant's alleged title, together with right to compel complainant to remove certain obstruction on the land, held a proper subject for a cross-bill.—Averill v. Vermont Valley R. R., Vt., 92 Atl. 220.

69. **Insurance**—False Representation. — A representation by an applicant for life insurance that he had never been examined for insurance and rejected is material, and, if false, avoids the policy.—Hardy v. Phoenix Mutual Life Ins. Co., N. C., 83 S. E. 5.

70.——Insurable Interest.—Where land was conveyed to plaintiff's father, because plaintiff was a minor and could not execute a valid mortgage thereon, but the father held in trust for plaintiff, the latter had an insurable interest.—Cummings v. Dirigo Mut. Fire Ins. Co., Me., 92 Atl. 298.

71.——Premiums.—Where the application was dated June 13th, and a policy issued June 23d, which gave a grace of one month in payment of annual premiums, except the first, and insured died several years later on July 23d without having paid the premium for that year, held that his policy had not lapsed.—Cilek v. New York Life Ins. Co., Neb., 149 N. W. 49.

72. **Intoxicating Liquors**—Ordinance. — A municipal ordinance, making it unlawful to carry intoxicating liquor for unlawful sale, held not in conflict with Pen. Code 1910, § 426, making it unlawful to keep or furnish at places of business or public places any intoxicating liquors.—Ramsey v. City of Atlanta, Ga., 83 S. E. 148.

73.——Unlawful Search.—Circumstances such as would cause an ordinarily prudent officer to believe that plaintiff had intoxicating liquor in his suit case for unlawful purposes, held not to justify officer in searching the suit case and using force necessary for that purpose.—Caffini v. Hermann, Me., 91 Atl. 1009.

74. **Judgment**—Merger.—Where a corporation which has purchased the property of another corporation and assumed its debts gives renewal notes for the debts, an unsatisfied judgment against the purchasing corporation on the renewal notes will not extinguish the original debts by merger.—Lowther v. Lowther-Kaufman Oil & Coal Co., W. Va., 83 S. E. 49.

75.——Motion to Open.—Where on an application to open a confessed judgment on a note, there was sufficient testimony to sustain a finding that the note was signed by one defendant as a surety for her husband, the granting of the application was not an abuse of discretion. Stewart v. Stewart, Pa., 92 Atl. 319.

76.——Non-Resident.—The Wisconsin statute authorizing personal judgments against a non-resident upon constructive service, where the non-resident has property within the state subject to the state's jurisdiction, is constitutional. —Closson v. Chase, Wis., 149 N. W. 26.

77.——Vacating Default.—Where defendant's attorney failed to file the answer in time, because he did not know of a change in the terms of court under an unindexed session act, the default will be vacated.—Callahan Const. Co. v. Thomas, Ky., 169 S. W. 828.

78. **Justices of the Peace**—Certiorari.—The action of a justice of the peace in taking jurisdiction of an action where the amount involved exceeded his jurisdiction may be corrected by certiorari, though no judgment has been rendered.—Stroud v. Conine, Ark., 169 S. W. 959.

79. **Landlord and Tenant**—Licensee.—Where plaintiff went to a barber shop in a rented building to give the barber a drink of whisky, and on returning fell because of a defective rail around a landing at the top of the outside stairs, he was a mere licensee, as to whom the landlord owed no duty to exercise reasonable care.—Austin v. Baker, Me., 91 Atl. 1005.

80.——Pleading.—A petition for injuries caused by striking plaintiff's bare foot against a nail in timber alleged to have been left by defendant's employes in a passway which plaintiff was authorized to travel on defendant's premises, held insufficient.—Amburgy v. Pond Creek Coal Co., Ky., 169 S. W. 855.

81. **Libel and Slander**—Privilege.—A letter written by one attorney to another, casting serious aspersions on the client of the addressee not confined to matters in litigation in which the attorneys were then engaged, held not privileged.—Savage v. Stover, N. J., 92 Atl. 284.

82. **Licenses**—Restriction. — An ordinance prohibiting the operation without a license of a billiard room or tenpin alley held not an unreasonable restriction on business.—Trammell v. Yancey, Ga., 83 S. E. 114.

83. **Life Estates**—Subrogation.—Where appellee, believing that the testator's wife could convey the fee of land devised to her for life, cared for her in consideration of a conveyance of the fee, he is, as against the remaindermen, subrogated to any rights of the wife to have the land sold for her support.—Hickman v. Moore, Ky., 169 S. W. 827.

84. **Limitation of Actions**—Laches.—Plaintiffs, in an action to recover for land conveyed by their grantor to defendants by mistake, if a purchaser from his grantee cannot toll the running of limitations against his action for deficiency by claiming that he relied upon the representations of the original grantor that the property had been surveyed and contained the number of acres represented.—Powell v. March, Tex., 169 S. W. 936.

86. **Mandamus**—Motion to Quash.—In mandamus the alternative writ takes the place of the declaration, and the facts therein well pleaded are admitted by a motion to quash the alternative writ.—State v. Lewis, Del., 91 Atl. 993.

87 **Master and Servant**—Emergency.—That a railroad employe needed assistance to load a trunk onto a passenger train was not such an emergency as authorized him to employ a third person to assist, and such person was but a volunteer.—Missouri, K. & T. Ry. Co. of Texas v. Moore, Tex., 169 S. W. 916.

88.——Instructions.—Where decedent fell from a hand car from a defect in the car and was killed, an instruction that there could be no recovery unless the car's unsafe condition could not have been discovered by him by ordinary care was erroneous.—Hale's Adm'r v. Illinois Cent. R. Co., Ky., 169 S. W. 877.

89.——Obvious Danger.—It cannot be said as a matter of law that a defect which allowed a cant hook at the end of the pole to oscillate slightly, so that it pulled out, is so obvious that a servant using such a hook was charged with knowledge of the defect.—St. Louis, I. M. & S. Ry. Co. v. Brown, Ark., 169 S. W. 940.

90.——Relation.—The relation of master and servant is not terminated by mere cessation of the duties assigned, but continues such reasonable time thereafter as will afford the servant opportunity to reach a place of safety from perils of the employment.—Jones v. Virginian Ry. Co., W. Va., 83 S. E. 54.

91.——Substantial Performance.—Person employed as manager of department store held to have substantially complied with his contract if he was a fairly efficient manager, gave his whole time and ability to the business in good faith, performed his duties to the best of his ability, and did not misconduct himself or otherwise violate the contract.—Carroll v. Cohen, Del., 91 Atl. 1001.

92.——Warning.—A railroad foreman engaged in work alongside the track, part of whose duty it was to watch for approaching trains, is not entitled to rely on the observance by train employes of rules requiring them to slow down and sound warnings on approaching such places. —Cincinnati, N. O. & T. P. Ry. Co. v. Swann's Adm'x, Ky., 169 S. W. 886.

93.——Workmen's Compensation Act.—The jurisdiction conferred on the Supreme Court of Appeals by Acts 1913, c. 10, § 43 (Code 1913, c. 15p [sec. 699]), to review acts of the Public Service Commission respecting the administration of the workmen's compensation fund, is original, and not appellate.—De Constantin v. Public Service Commission, W. Va., 83 S. E. 88.

84. **Mechanics' Liens**—Evidence.—That an owner after receiving a stop notice from a subcontractor paid him $900 on account of the amount claimed in the notice, such fact, with others, was sufficient to show that the owner was satisfied with the sub-contractor's work.—Hoffmeir v. Trost, N. J., 92 Atl. 277.

95. **Mines and Minerals**—Royalties.—Where lessee paid the royalties into court, and the lessor of the adjacent lands asked the court to establish the rights of the owners of the lands, the court must determine such question and direct the payment of royalties accordingly.—Scott v. Daniels, Ky., 169 S. W. 830.

96. **Municipal Corporations**—Governmental Duty.—The city of Louisville exercises a governmental function for the protection of the city's health, in the maintenance of sewers and is not liable for the death of an employe who while trying to remove a wooden form from the water at the mouth of a sewer, fell into the water and was drowned by reason of the wet and slippery condition of the pier, due to their negligence.—Johnson's Adm'r v. Commissioners

98. **Navigable Waters**—Survey.—A survey returned as bounded by a navigable river vests in the owner the right to the soil to the ordinary low water mark, subject to certain rights of the public in the stream between ordinary high and ordinary low water mark.—Miles Land Co. v. Hudson Coal Co., Pa., 91 Atl. 1061.

99. **Negligence**—Proximate Cause.—The doctrine of comparative negligence and apportionment of damages does not apply, where the contributive negligence of the injured person was the sole cause of injury, or where by ordinary care he could have avoided injury.—Georgia R. & Banking Co. v. Auchinachie, Ga., 83 S. E. 127.

100. **Partition**—Transfer to Other Docket.—Where issue in partition is joined as to the right of one of the claimants to share as a tenant, the clerk must transfer the case to the civil docket for jury trial, the statute being mandatory, and hence the clerk cannot dismiss the proceedings at the request of plaintiffs.—Haddock v. Stocks, N. C., 83 S. E. 9.

101. **Partnership**—Dissolution.—In view of Civ. Code, §3231, where a note signed in a firm name by a partner and the manager is accepted in settlement of an account against the firm, the partners are bound, though the partnership has been dissolved without notice to the creditor.—Parker v. Southern Ruralist Co., Ga., 83 S. E. 158.

102.——Holding Out.—Where there is a holding out of a partnership relation by persons inviting to their premises a person injured from their negligence, liability results, without regard to the actual existence of the partnership relation.—Jewison v. Dieudonne, Minn., 149 N. W. 20.

103. **Paupers**—Question of Fact.—Under Rev. St. c. 27, § 45, notice by plaintiff as to the condition of his father and mother, and his inability to support them, held to contain all the elements of information required, and whether they were so clearly and expressly stated as to enable the officers to understand them was a question for the jury.—Allen v. Inhabitants of Lubec, Me., 91 Atl. 1011.

104. **Perpetuities**—Defined.—Where the event on which an estate is to arise is an option to purchase, which is so uncertain that it may expire at some time in the future or may not expire at all, the interest created at the option is not vested, but is contingent, and is within the rule against perpetuities.—Barton v. Thaw, Pa., 92 Atl. 312.

105. **Prostitution**—Variance.—An indictment under the Pandering Act for enticing a female under age to engage in a life of prostitution at the home of defendant, "situated on Lake street in the city of Paragould," held not sustained by proof that the house was not upon Lake street, but on a street in the vicinity.—Lee v. State, Ark., 169 S. W. 963.

106. **Railroads**—Evidence.—In an action for the death of a traveler at a crossing, evidence held insufficient to show that the servants in charge of the train were guilty of any negligence after they saw that deceased was about to go on the track.—Seviour v. Rutland R. Co., Vt., 91 Atl. 1039.

107.——Humanitarian Doctrine.—Where a railroad company discovers that a trespasser is in danger of being struck by an approaching train and that he is unaware of his peril, it is then bound to exercise ordinary and reasonable care to prevent injury to him.—Georgia R. & Banking Co. v. Auchinachie, Ga., 83 S. E. 127.

108. **Reference** — Recommittal.—Where the trial judge deems that there is not sufficient finding of facts to support the referee's conclusion, he should either find the fact from the evidence, or recommit the case to the referee, with directions to make a more specific finding of facts.—French v. Richardson, N. C., 83 S. E. 31.

109. **Sales**—Implied Warranty.—In contracts for the sale of personal property, as between

specified its diameter and its conductivity, there was an implied warranty that it was properly constructed wire of the size and kind specified and reasonably suited for use.—John A. Roebling's Sons Co. v. Southern Power Co., Ga., 83 S. E. 138.

111. **Street Railroads**—Franchise.—Where a city granted a street railway company a franchise, and after it was assigned to defendant amended it by a relocation of part of the line, which relocation was accepted by defendant, all other provisions and conditions in the franchise remained in force.—City of Montpelier v. Barre & M. Traction & Power Co., Vt., 92 Atl. 241.

112. **Taxation**—Forfeiture.—The presumption against forfeiture of title for nonentry for taxation and nonpayment of taxes relieves the plaintiff, in a proceeding to vindicate his title, from proving in the first instance the taxation thereof and the payment of taxes thereon.—Wildell Lumber Co. v. Turk, W. Va., 83 S. E. 83.

113. **Telegraphs and Telephones**—Benefit of Third Person.—The addressee of a telegram negligently delayed in delivery is entitled to sue therefor as a party to a contract made for his benefit.—Western Union Telegraph Co. v. Compton, Ark., 169 S. W. 946.

114. **Time**—Computation.—Pen. Code 1910, § 1, par. 8, providing that when a number of days is prescribed, and the last day falls on the Sabbath, another day should be allowed, is not applicable, so as to exclude Sunday, where the computation is of months or years.—Brown v. Emerson Brick Co., Ga., 83 S. E. 160.

115. **Torts**—Actionable Wrong.—Where one is injured by the wrongful act of another, and a third person suffers an indirect loss from some contract obligation to the injured party, the loss is not actionable; but if the wrongful act is maliciously and fraudulently intended to injure such third person, and does injure him, it is actionable.—Nieberg v. Cohen, Vt., 92 Atl. 214.

116. **Trespass**—Boundary Line.—Where the boundary line between tracts, title to which was derived from a common grantor, is in dispute, the claimant in possession can hold against all the world, except the true owner, and the first claimant can recover in trespas only in case the land in dispute is within the description in the conveyance to him.—Southern Realty & Inv. Co. v. Keenan, S. C., 83 S. E. 39.

117. **Trover and Conversion**—Landlord and Tenant.—A landlord, when sued for the conversion of chattels of the tenant, may show that he removed articles from the leased building for safekeeping and had tendered the same to the tenant.—Copeland v. Porter, Tex., 169 S. W. 915.

118. **Trusts**—Overpayment.—Where executrix overpaid herself as legatee and as trustee under a trust for her own benefit and gave her note to the trustees under another trust in the residue of the estate, held, that they should hold this note as principal and not turn it over to their cestui que trust.—Moore v. McKenzie, Me., 92 Atl. 296.

119.——Parol Trust.—Delivery of money by wife to husband with direction to deposit it for care and education of son, and deposit in husband's name as trustee, held to create a valid, enforceable, parol trust in favor of the son.—Graham's Adm'r v. English, Ky., 169 S. W. 836.

120.——Presumption.—The rule that a trustee buying trust property at a sale, whether public or private, brought about or in any way directed by him, will be presumed to buy for the benefit of the trust does not apply where the trustee has no direct control over or is not instrumental in bringing about the sale.—Calvert v. Woods, Pa., 92 Atl. 301.

121.——Spendthrift Trust.—Where an insurance company had sold to a spendthrift, since deceased, shares of its stock at par value, and there was no evidence as to value, except that deceased had sold it for different amounts, the insurance company's claim against the estate for such stock was properly allowed at the highest price received by deceased for any of it.—Ford

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Central Law Journal.

ST. LOUIS, MO., JANUARY 29, 1915.

THE CONTRACTS OF CITIZENS OF OUR NEUTRAL GOVERNMENT WITH FOREIGN BELLIGERENTS UNDER OUR COMMERCE CLAUSE.

It is to be conceded that the right of contract may be affected by the overriding power of our commerce clause. But that clause is designed solely for the benefit of trade flowing to or from this country or among the states thereof. Is it constitutional to exert it for the benefit of belligerent nations or their inhabitants, our own nation being neutral? If the answer to this question is in the negative, what is called the Bartholdt Bill in Congress to prevent shipments of goods to belligerent nations in Europe would seem to be unconstitutional, a particular class of goods being mentioned.

Such shipment may not in itself be a contract, but it is such an integral part of the contract as to inhere therein as part of its very life. Sioux Rem. Co., v. Cope, 35 Sup. Ct. 57. Thus it may be urged that as the carrying out of a contract in every way lawful at the time, is subject, if it contemplates a shipment in commerce, to what lawfully may affect it. A contract by a citizen of this neutral country with a belligerent government or any citizen thereof may be affected even to destroying all beneficial results therefrom arising out of lawful regulation of commerce between this country and foreign countries. This we take to be the effect of the ruling as to an interstate contract in Louisville & N. Ry. Co. v. Mottley, 219 U. S. 467.

But we started out by premising that the commerce clause was for our own use and advantage and not for that of any other nation. The inquiry, then, would be resolved into the question whether Congress may declare for the good of our trade, that conditions in foreign countries make it detrimental, not to them, but to us, that no goods, contraband or otherwise shall be shipped from our ports to either or any of such countries while in a state of war.

It might be claimed, as we believe it is claimed, that the shipment of goods to belligerents is a moral issue and infraction of its precepts may create in the shipping country such an opposition as to affect an interstate trade.

Our supreme court has gone some length in the Mann act cases in declaring their constitutionality as resting in the police power of the nation at large, as distinguished from state police power. But this was declared as to a law in regard to a violation that was against universal morality, and not as to what greatly may be differed about by reflecting minds. It would not embrace a sort of casuistry among moralists. It ought rather to come under Justice Holmes' definition of what is the police power of a state, as declared in the Bank Guaranty cases, we not saying that we indorse this definition. It, at least, expresses, however, a sort of limit in the ascertainment of what is police power. He said the police power represents "the preponderant opinion" in a state on a particular subject.

We know, too, from these cases, that it may be necessary to appeal to police power to sustain constitutionality of a statute coming under the commerce clause. But it is our police power that is appealed to, not that of some other nation.

The exercise of such a power by Congress would be in the laying of an embargo. This comes under the commerce clause, and as said by Justice Story in the third volume of his commentaries, the general embargo, indefinite as to time, laid by Act of Congress of 1807, went to the utmost verge of implied constitutional power.

Chancellor Kent, in discussing an objection raised to the constitutionality of this act, declared that: "The power of Congress was sovereign relative to commercial intercourse, qualified by the limitations and restrictions expressed in the Constitution; and by the treaty-making power of the President and Senate. Congress has a right to control or abridge commerce for the advantage of great national purposes. Non-intercourse and embargo laws are within the range of legislative discretion; and if Congress have the power, for purposes of safety, or preparation, or counteraction, to suspend commercial intercourse with foreign nations, they are not limited as to duration, more than as to the manner and extent of the measure." 1 Kent's Com. 432.

An embargo act, then, to be constitutional, must have alone the benefit of this country in view. It may be laid as to a particular product, where foreign nations are at war, because to preserve ourselves it is wise precaution. We may admit, its discretion in the laying of embargoes will be given large latitude.

But, at the last, a court must be able to see, that the laying of an embargo has relation to the betterment or the protection of our own commercial interests.

We conclude, therefore, that whether an embargo is constitutional or not is largely a question of fact. The Act of 1807 and its amendments were assumed, without discussion, in the Supreme Court, to be constitutional. They were general in their nature, but the theory is that embargo is not a permanent but a temporary suspension of intercourse between nations, all of which implies that our own policy, and not that of other nations, must be subserved in its enforcement. One of the reasons stated by Judge Kent as authorizing the laying of an embargo is "counteraction," that is to say retaliation. But when this begins, surely neutrality would be at an end. In effect we would be a belligerent.

NOTES OF IMPORTANT DECISIONS

INSANITY—JUDGMENT ESTABLISHING NOT CONCLUSIVE OF CRIMINAL IRRESPONSIBILITY.—In the case of Drew v. Thaw, 35 Sup. Ct. 137, decided by U. S. Supreme Court, the principal point held is that one acquitted upon the ground of insanity and committed to a state hospital for insane criminals may be indicted for conspiracy to escape.

It was urged that it was not a crime for the inmate of an insane asylum to escape if he could, and, therefore, no crime to enter into a conspiracy to enable him to escape. Justice Holmes, assuming the truth of the premise, says: "It is perfectly possible, and even may be rational, to enact that a conspiracy to accomplish what an individual is free to do shall be a crime."

But this does not yet get us to the principal point above referred to. It still leaves the question of compos mentis in the air. As to this, it is said that: "The statute that declares an act done by a lunatic not a crime adds that a person is not excused from criminal liability, except upon proof that at the time 'he was laboring under such defect of reason as: 1, not to know the nature and quality of the act he was doing; or, 2, not to know that the act was wrong.' The inmates of lunatic asylums are largely governed, it has been remarked, by appeal to the same motives that govern other men, and it well might be that a man who was insane and dangerous, nevertheless in many directions understood the nature and quality of his acts as well, and was as open to be affected by the motives of the criminal law as anybody else." The writ of habeas corpus in the case was discharged and the prisoner in extradition ordered delivered to the demanding state.

The contention made by the petitioner seems thus resolved into a mere play upon words. It attacks a statute for the confinement of insanes on the ground of its being dangerous for them to be at large, as embracing general immunity from prosecution should they escape confinement. The final analysis of such a position is that though one should, because of his insanity, as regards the commission of a particular crime, be not punished therefor, he may, if permitted to go at large, be punished for another crime, but, if laws enacted to protect society confine him, it is an adjudication that he is not responsible ever afterwards for any crime. No such absurdity could have been contemplated, and, therefore, was not embraced in the statute.

Take confinement of lunatics by other process than upon a verdict of acquittal for insanity, and surely the result would not be that they should be freed of responsibility for crime of which morally they are guilty. Insane institutions are for the protection of the public, and for the cure of human beings of defects, not necessarily incapacity, of mind

PLEADING AND PRACTICE—GRANTING PARTIAL NEW TRIAL WHERE ERROR IS SEPARABLE.—Now the West Virginia Supreme Court of Appeals joins the states which hold, that where error is committed in a trial court and a partial new trial can be granted, it may be manifest injustice not to do this. Moss v. Campbell's Creek R. Co., 83 S. E. 721.

The case concerned only the omission by plaintiff to plead a formal fact, viz., that plaintiff suing as administratrix had been duly appointed and qualified. There was demurrer for this reason but it was overruled. Subsequent decision sustained the view that demurrer was good, but non-necessity of the averment was generally held.

The case proceeded and "just as full and fair a trial on the merits of the action was had on the declaration as would have been had with it. * * * Because we have recently discovered its materiality and in a sense have taken litigants by surprise, shall we begin to overthrow trials for the omission of the averment, when there is a sensible way to supply it and to try separately any issue raised on it? Without a retrial of the merits already tried with no error there is a way to determine safely whether the verdict that has been found should fall and the suit abate. The one fact to be determined to support the verdict is separable from the merits already found."

In this case it is perceived that defendant did all he could to save his execption and he saved it. But the effect to be given the exception when sustained, was not as he anticipated. Applying this rule to many other points raised on demurrer to pleadings would greatly reduce reversals in appellate courts, except in a limited way.

And if we extend the principle to separableness in questions of fact, for example, sustaining a verdict so far as it finds liability and reversing so far as measure of damages are concerned, there will be the same prevention of "manifest injustice," as was adjudged in this case.

The case cites quite an abundance of authority in its support and it is a good case for code revisionists, such as in Missouri and other reformers of judicial procedure to consult. It is to be noted about this case, that the theory upon which it was tried was forced on appellant by the court below, and yet for the error, adjudged to be substantial, only a partial new trial was adjudged.

FOREIGN CORPORATIONS — COMPLIANCE WITH STATUTES AS CONDITIONING RIGHT TO SUE IN STATE COURTS.—We think it to have been quite well accepted by state courts, that state statutes forbidding a foreign corporations from suing therein unless they have complied with state laws in regard to doing business therein, do not apply to such a corporation suing upon an interstate contract. The fact that such a question is for the first time directly presented to our Federal Supreme Court would seem to bear out this statement. Sioux Remedy Co. v. Cope, 35 Sup. Ct. 57.

In this case the Supreme Court of South Dakota holding that a state statute forbidding a non-complying foreign corporation maintaining any action at law or otherwise in any of the courts of this state" was constitutional so far as suits on interstate contracts are concerned, is reversed.

Mr. Justice Van Devanter, speaking for an unanimous court, says: "It may be conceded in a general way that a state may restrict the right of a corporation to suit in its courts (cases cited). And in the same general way it may be conceded that a state may restrict the right of such corporations to engage in business within its limits (cases cited). But the power to deal with these subjects, like all other state powers, can only be exerted within the limitations which the constitution of the United States places upon state action."

Coming down to the particular question involved the court says: "We think that when a corporation goes into a state other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the state cannot, consistently with the limitations arising from the commerce clause, obstruct or hamper the attainment of that purpose. If it were otherwise, the purpose of the constitution to secure and maintain the freedom of commerce by whomsoever conducted could be largely thwarted by the states and commerce itself seriously crippled."

Elsewhere in the opinion it is said that: "The right to demand and enforce payment for merchandise sold in interstate commerce, if not a part of such commerce, is so directly connected with it and is so essential to its ex-

istence and continuance that the imposition of unreasonable conditions upon this right must necessarily, act as a restraint or burden upon interstate commerce."

We set forth the above language, not because there is any possibility of a contention to the contrary, but rather that it may definitely appear in a matter of such widespread importance there may be no claim to the contrary of the explicit view thus set forth.

INJUNCTION AGAINST LIBEL AS INJURIOUS TO PROPERTY RIGHTS.

Preliminary.—It has been said that: "A court of equity has no jurisdiction to restrain a mere libel or slander. Nor does the fact that the false statement may injure plaintiff in his business or as to his property constitute a sufficient ground for an injunction, in the absence of acts of conspiracy, intimidation or coercion."[1] It is not my purpose here to touch upon conspiracy, intimidation or coercion by means of libel or slander giving to a court of equity the right to restrain, it being sufficient to refer to a rather noted case,[2] which sustains this right and a great abundance of authority is cited. It may be said, however, that it would seem not to be difficult ordinarily to aver that a libelous publication or a slander was merely the means used to work injury to one's business reputation or to affect his property rights, and that these means were designed by conspiracy to intimidate or coerce. Indeed I greatly doubt whether any libelous publication or any slander persisted in reasonably might not be claimed to be resorted to but as a means to the end of injuring a plaintiff in his business or his property. Malice in the publication or utterance, if as a mat-

makes at least a duress of property, though it be not the result of conspiracy nor brings about intimidation. Indeed it seems a little difficult to suppose a case of intimidation by libel or slander, unless it be embraced in coercion as an effect of intimidation.

At all events, however, to sustain an injunction in this class of cases has at bottom nothing to do with the question really involved, because what may be done by way of publication or utterance are acts in furtherance of the scheme or purpose, the arresting of which is sought to be restrained. Take for example a boycott, as was considered in the Gompers' case, and the court considers them as the "means whereby a boycott is unlawfully continued." They would be in the category of other things as "means" for the purpose that was enjoined.

Sources of the Rule that Equity Will Not Enjoin—The Common Law.—One theory that a court of equity will not enjoin a libel or slander is that at common law this was never done, but when this is discussed few, if any, English cases are cited other than those decided since our Declaration of Independence, and how certain they are is shown by the fact that Vice-Chancellor Malins said in 1869, that: "In the decision I arrive at I beg to be understood as laying down that this court has jurisdiction to prevent the publication of any letter, advertisement or other document, which, if permitted to go on would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation."[3] In the latter of the above cases much authority is cited by the Vice-Chancellor and he stated as a broad rule that: "The jurisdiction of this (equity) ceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or to make it less valuable or comfortable for use or occupation."

Notwithstanding that Lord Eldon had declared in 1818, that a court of equity has no jurisdiction to prevent the commission of crime, he said in the same case that: "The question will be, whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect."[4] In the Holden case supra, the libelous publication was that plaintiff was a partner in a bankrupt firm. It was restrained. He refers to a case decided in 1847,[5] which concerned the unauthorized use of plaintiff's name in a prospectus, and while this may not have been a libel, it was a misrepresentation, which was taken by Vice-Chancellor Malins to involve the same principle.

In 1810 Lord Ellenborough said *arguendo* in speaking of a picture that if it was a libel upon the persons introduced into it "upon an application to the Lord Chancellor he would have granted an injunction against its exhibition."[6]

In an old case involving contempt, decided in 1742,[7] where it was said, incidentally, the contempt being for publishing a libel, that: "Notwithstanding this should be a libel, yet unless it is a contempt of court, I (the chancellor) have no cognizance of it, for whether it is a libel against the public or private persons, the only method is to proceed at law," no doubt a good general principle, but it distinguishes in no way as or not property interests are affected.

But it is shown that in 1874 Vice-Chan-

cases decided since July 4, 1776. By the Judicature Act of 1873, the power to grant injunctions in cases of libel was conferred and it was not until the following year, upon a case arising under the law prior to that act, that it appears to have been held that the principles and practices of a court of equity forbade the granting of such injunctions, though a property interest were affected. Even, if we admit that the rules and principles governing an English court of equity became a part of our common law, there is great dearth of decisions prior to 1810 and in that year it was said by Lord Ellenborough, that an injunction against libel was grantable.

American Cases Founded on English Decisions.—A recent case decided by Second Circuit Court of Appeals[9] is a fair representative of decision on this subject prevailing in the lower federal courts. It declares that: "Courts of equity like courts of law follow established precedents. They cannot usurp powers they do not possess. We recognize the fact that equity is an elastic system; that its procedure is progressive and is capable of accommodating itself to the changing emergencies and demands of the age. If it were otherwise, it could not so well have met the needs of our civilization. At the same time courts are not to usurp powers they do not possess. In a country which has constitutional guarantees of freedom of speech and of the press and of trial by jury, courts of equity should be slow to assume that they possess a power to deal with the publication of libels that the High Court of Chancery in England disclaimed." This statement lacks greatly in accuracy. If it is a usurcame along after we had separated from the mother country and during that period some chancellors were contending that property must be protected by a court of equity whenever and however assailed and it was only after the passage of the Judicature Act, enacted seemingly to get rid of a division in opinions, that it was definitely held as the excerpt states. This resembles a harking back to old law by the High Court of Chancery more for the purpose of saving its dignity than for any other reason. To what is said about the right of free speech and a free press I will advert hereinbelow.

There is a case referred to by this decision, which seems to me not reconcileable with the Gompers' case *supra*, inasmuch as the libels sought to be enjoined were means in a conspiracy to injure the property of plaintiffs.[10] But take it at its face value for what it rules and all it asserts is that: "If a court of equity could interfere and use the remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law." Here nothing is said about jurisdiction of courts of equity, as under English law, but it is suggested that it would be inconvenient for courts of equity to take cognizance of such suits and not a word is said about irreparable injury to property or the right of free speech. Many state cases which hold as do the lower federal court cases rely, as they do, on late English decision.[11]

Constitutional Right of Free Speech.—Some cases and notably one from Missouri,[12] holds that the guaranty under a written constitution of the right of free speech, requires that before any judgment shall find any one liable therefor, there must be a jury trial, though slander by his speech may work injury to property. Inconsistently this court adds that "after verdict in favor of the plaintiffs, they can have an injunction to restrain any further publication of that which the jury has found to be an actionable libel or slander. Odgers' Libel and Slander, 2d Ed., p. 340." The reference to Odgers is not useful, because his text is all based on decision under the Judicature Act of 1873. But taking the statement as it stands as regards the constitutional right of free speech, then the constitution should protect a continuance in the use of free speech as well as in its original use. It is in no event right to sue any one for the right of free speech, but only for the abuse of the right, and whether a jury or the court passes on the claim of abuse of the right, there is admitted to be merely a cause of action. If that abuse causes irreparable damage, why should it not be arrested? If it could not before verdict, it ought not to be after verdict. Later this case was cited to the proposition that "as a rule a court of equity has no power to restrain a libel on title."[13] Whether it was here meant to say, that the only exception to the rule was that a verdict in an action for libel should be first obtained it is not known. We may conceive, as seems to have been conceived in the Keitel case *supra*, that such constitutional right was an argument against equitable interposition being granted, rather than a direct prohibition against such, and, as I have said, if an absolute prohibition it would operate as well after as before verdict in an action at law. There is as much right to repeat a libel as to publish it for the first time.

A Texas Court of Civil Appeals in

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(10) Francis v. Flynn, 118 U. S. 385, 30 L. ed. 165.

tion of preventive relief in equity against the publication of libelous statements affecting the character or business of plaintiff, decides to incline to the view, that relief should not be granted in view of the right of free speech, while one is liable for abuse of the privilege.[14] This case contains a mere *ipse dixit* that this provision should be applied this way and cites cases which are based on late English decision.

Pennsylvania court[15] speaks of a case of a libel being a continuing injury and says that complainant's right must be so clear as to be practically conceded or it must first be established by a verdict of a jury." This seems to rule that equity may on principle enjoin a libel, but there is rigidity required in proof of the right to enjoin.

Cases Conceding the Right to Enjoin.—An early Georgia case[16] states as a general rule that injunction will not be granted to restrain slander or libel of title or reputation, but "courts of equity constantly refuse to lay down any absolute limitation to its power to issue the writ of injunction," and "The principle is that to authorize the writ there must be irreparable expected injury to a property right." In this case it was held there was no infringement of a property right and injunction was denied. In a later Georgia case, where the injunction was refused, upon the facts, it was held that a court of equity has the power to enjoin the publication and circulation of a libel.[17] In the opinion it was said: "We recognize the rule that a court of equity upon a proper case has the power to enjoin the publication and circulation of a libel, and that the principle is applicable to equitable rights arising under the patent laws of the United States, where the legality of the patent is not the subject of inquiry, but the patent right is only collateral to the relief sought."

In an Indiana case all of the cases citing the late English cases were referred to and the court said: "The complaint before us involves more than libel of title. It charges the false and malicious destruction of the appellee's property rights in injuring its business, deterring others from dealing with it, and rendering valueless its inventions and improvments, its investments and manufactures. It is more than a mere libel not interfering with property rights."[18] There was express dissent from an early Missouri case,[19] which spoke regarding the constitutional guarantee of free speech exempting a libeller from equitable interference as against false and injurious statements affecting property rights.

It is to be noted, too, that Judge Blatchford claimed when a libelous publication contained threats intended to intimidate customers this differentiated a case from the rule followed by the lower federal courts.[20] The judge said: "If a court of equity cannot restrain an attack like this upon a man's business, then the party certainly is remediless, because an action at law in most cases would do no good and ruin would be accomplished before an adjudication could be rendered." The judge merely was endeavoring to take this case from under decision in the federal courts, he possibly thinking, himself, that any libel injurious to property from continuousness in repetition ought to be subject to injunction. And this seems the view of Missouri courts, except they feel that the constitutional guaranty first demands a verdict in a common law action.

and the statement at the head of this article bears him out. Why, however, should this make a difference, where an equity court is called on to protect property, that is exposed to loss from a libel or a slander being repeated? Loss of property is the gist of the reason for interposition by a court of equity and loss of trade is no less sacred a loss than is any other loss when injury is threatened.

Conclusion.—It seems to me that courts which deny relief by injunction largely get their authority from a checkered career in English decision, all occurring since we separated from England, and the principle upon which other cases proceed is from a false view of the constitutional right of free speech. Men have the free right of locomotion, but if they abuse that right by trespass they become subject to liability for threatened repetition of trespass, if working irreparable injury entitles to injunction. So also when an abuse of the right of free speech involves something akin to trespass on another's rights and liability arises, as the constitutions in terms state, why is not threatened repetition subject to injunction where it injures property? Instead of the constitutional guaranty freeing the abuser of his privilege from an injunction, the implication from the statement of liability therefore is in favor of the right of injunction.

The principle derived from such of English decision as is approved by these cases, was largely adopted it seems to me according to the reasons expressed in Francis v. Flynn *supra,* that: "If a court of equity could interfere and use the remedy of injunction in such cases, it would draw to itself the greater part of the litigation belonging to courts of law."

A further thought also here suggests itself, and that is that the old equity rules of the federal courts were fashioned ly taken care of by those rules. But state rules were fashioned otherwise, going more on the principle that equity would assist in the protection of property where the remedy at law was ineffective. Codes which abolished all distinction between law and equity sides of a court extended this idea and it was intended that courts in granting relief against a wrongdoer repeating his wrongs to the injury of property, should not be shackled by technical. rules. When the federal court speaks of a court of equity drawing to itself causes of action belonging to courts of law, its observation is meaningless under a code which abolishes the distinction between law courts and equity courts, and invites into a tribunal where justice is administered according to the very right involved. Many of the cases denying relief admit there is injury which cries to a court for relief.

N. C. COLLIER.

St. Louis, Mo.

MISSOURI'S CELEBRATED MULE CASE.

LYMAN v. DALE.

Supreme Court of Missouri, Dec. 2, 1914.

171 S. W. Rep. 352.

For five years Missouri's so-called "celebrated mule case" has wended its weary and expensive way through all the courts, and finally ended in a complete vindication of the Missouri mule.

The action was for the sum of $5.00 for damages occasioned by leading an "unruly" mule through the streets in such a negligent manner as to cause him to run against plaintiff's buggy and damage it.

Judge Lamm, Missouri's retiring Chief Justice, whose picture we reproduce on our cover page in this issue, wrote a concurring opinion in this celebrated case. Judge Lamm, whose reputation for learning and phrase-making is nation-wide, was in one of his happiest moods when he wrote this opinion, and we quote from it in full as being worthy of being preserved as one of the masterpieces of judicial literature.

bene: If, as a pundit tells me, it was Garrick, and not Goldsmith, Johnson spoke of, and if, in quoting, I misquote, then memory has played a trick upon me, and a learned boy will correct me. Time and weightier matters press me to go on and leave the 'quotation' (?) stand.) The function of this suit is somewhat the same. Beginning with the 'J. P.'s' it has reached the 'P. J.'s,' and in its journey has run the gamut of three courts, one above the other. Now, secundum regulam, it, a fuss over $5, has reached the highest court in the state for final disposition—all this because (1) of divergence of opinion among our learned brethren of the Springfield Court of Appeals, and (2) the provisions of the constitution in that behalf made and provided.

As I see it, the case is this: Dale, a man of substance, a farmer, owned a brown and a gray mule, both young and of fine growth; one saddlewise, the other otherwise. Both, used to the plow and wagon, were entitled to the designation of 'well broke and gentle.' One Parker was Dale's manservant, and in the usual course of his employment had charge of these mules. On a day certain he had driven them to a water wagon in the humble office of supplying water to a clover huller in the Ozark region hard by its metropolis, to-wit, Springfield. Eventide had fallen; i. e., the poetical time of day had come when the beetle wheels his droning flight, drowsy tinkling lulls the distant folds, and all the air a solemn stillness holds. In other words, dropping into the vernacular, it was time to 'take out.' Accordingly, Parker took out with his mind fixed on the watchdog's honest bark baying deep-mouthed welcome as he drew near home; he mounted the ridable mule. He says he tied the other to the hames of the harness on the ridden one by a four or five-foot halter rope, and was plodding his weary way homeward, a la the plowman in the Elegy. The vicissitudes of the journey in due course brought him to Walnut street in said city of Springfield. At a certain place in that street the city fathers had broken the pavement and made a 'rick of brick' aside a long hole or ditch. Hard by this rick of brick was a ridge of fresh earth, capped by a display of red lantern danger signals. It seems the unridden mule crowded against the ridden one and harassed Parker by coming in scraping contact with his circumjacent leg. Any boy who ever rode the lead horse in harrowing his

At about the same time, Parker had reached said part of Walnut street, plaintiff and two others were in a buggy pulled by a single horse and on their own way home to the country. So equipped, these several parties met face to face. At this point it will do to say that, while the mules were used to being on the water wagon, it is not so clear that these travelers three were. There are signs of that artificial elation in the vehicle party that in the evening springs from drinking ('breath-in freely'), but on the morning after produces the condition of involuntary expiation Dr. Von Ihring calls 'katzenjammer.' They disavow being half seas over or drunk.

In the course of their journey they, too, came to the brick rick, the ditch, the ridge of dirt, and the red lights on Walnut street. There they met, as said, the gray and brown mule and Parker face to face. When mules and rider approached and passed the three travelers, all on the same side of the ditch, the led mule (whether scared by the hole in the ground, the rick of brick, or the ridge, is dark) shied from his fellow ('spread' himself), and presently his hind leg was mixed up with the shafts and wheel of the buggy. When the status quo ante was re-established, both leg and wheel were found damaged. Subsequently a blacksmith offered to repair the damages to the wheel for, say, a dollar and a half. This sum, defendant, though denying liability, was willing and offered to pay; but plaintiff's dander was up, and he, as buggy owner, demanded a new wheel worth $5 and sued. In the justice court defendant lost outright and appealed. In the circuit court, the same. The learned judges of the Court of Appeals could not agree (the furor scribendi being much in evidence, and three learned opinions falling from their several pens) and sent the case here—and here it is.

My Brother GRAVES has well disposed of it on certain grounds, but the theme being the Missouri mule, and state pride calling for further exposition, the said furor scribendi has seized me—witness:

It is argued that it was negligence to ride one mule and lead its fellow by hand. That they should be halter-yoked 'neck and neck.' Parker says he necked them in a way, but plaintiff takes issue on the fact. Allowing credit to plaintiff's evidence, two questions spring, viz.: First: Is the neck-and-neck theory 'mule law' in this jurisdiction? Second:

the second as more important. It will be observed that the neck and forequarters of the mule did not do the damage. Contra, the hindquarters, or 'business end' of the mule, were in fault. We take judicial notice of the facts of nature. Hence we know that haltering a mule neck and neck to another will not prevent his hind parts spreading. His neck might be on one line, but his hind legs and heels might be on another—a divergent one. True, the mental concept relating to shying or spreading would naturally originate in the mule's head. But it must be allowed as a sound psychological proposition that haltering his head or neck can in no wise control the mule's thoughts or control the hinder parts affected by those thoughts. So much, I think, is clear and is due to be said of the Missouri mule whose bones, in attestation of his activity and worth, lie bleaching from Shiloh to Spion Kop, from San Juan to Przemysl (pronounced, I am told by a scholar, as it is spelled). It results that the causal connection between the negligence in hand and the injury is broken, and recovery cannot go on the neck-and-neck theory. This because it is plain, under the distances disclosed by the evidence, that the mule's hind legs could reach the buggy wheel in spite of a neck-and-neck attachment.

The next question is a bit elusive. But seems lodged in the case. It runs thus: There being no evidence tending to show the mule was 'wild and unruly' as charged, is such a mule, per se, a nuisance, a vicious animal, has he a heart devoid of social duty and fatally bent on mischief when led by a halter on the street of a town, and must his owner answer for his acts on that theory? Attend to that view of it:

There are sporadic instances of mules behaving badly. That one that Absalom rode and 'went from under' him at a crisis in his fate, for instance. So it has been intimated in fireside precepts that the mule is unexpected in his heel action, and has other faults. In Spanish folklore it is said: He who wants a mule without fault must walk. So, at the French chimney corner the adage runs: The mule long keeps a kick in reserve for his master. 'The mule don't kick according to no rule,' saith the American negro. His voice has been a matter of derision, and there be those who put their tongue in their cheek when speaking of it. Witness the German proverb: Mules make a great fuss about their ancestors having been asses. And so on, and so on. But none of these things are factors in the instant case, for here there was no kicking and no braying standing in the relation of causa causans to the injury to the wheel. Moreover, the rule of logic is that induction which proceeds by merely citing instances is a childish affair, and, being without any certain principle of inference, it may be overthrown by contrary instances. Accordingly, the faithfulness, the dependableness, the surefootedness, the endurance, the strength, and the good sense of the mule (all matters of common knowledge) may be allowed to stand over against his faults and create either an equilibrium or a preponderance in the scales in his favor. He then, as a domestic animal, is entitled to the doctrine that, if he become vicious, guilty knowledge (the scienter) must be brought home to his master, precisely as it must be on the dog or ox. The rule of the master's liability for acts of the ox is old. Ex. 21:29. That for the acts of the dog is put this way: The law allows the dog his first bite. Lord Cockburn's dictum covers the master's liability on a kindred phase of liability for sheep-killing, to-wit: Every dog is entitled to at least one worry. So with this mule. Absent proof of the bad habit of 'spreading' when led, and the scienter, liability did not spring from the mere fact his hind leg (he being scared) got over the wheel while he was led by a five-foot halter rope, for it must be held that a led mule is not a nuisance, per se, unless he is to be condemned on that score out and out because of his ancestry and some law of heredity, some asinine rule, so to speak—a question we take next.

(2) Some care should be taken not to allow such scornful remarks as that 'the mule has no pride of ancestry or hope of posterity' to press upon our judgment. He inherits his father's ears; but what of that? The asses' ears, presented by an angry Apollo, were an affliction to King Midas, but not to the mule. He is a hybrid, but that was man's invention centuries gone in some province of Asia Minor, and the fact is not chargeable to the mule. So the slowness of the domestic ass does not descend as a trait to the Missouri mule. It is said that a thistle is a fat salad for an ass' mouth. Maybe it is also in a mule's, but, be it so, surely his penchant for homely fare cannot so far condemn him that he does not stand rectus in curia. Moreover, if his sire stands in satire as an emblem of sleepy stupidity, yet that avails naught, for the authorities (on which I cannot put my finger at this moment) agree that the Missouri mule takes after his dam and not his sire in that regard. All assés are not four-footed, the adage saith, and yet to call a man an "ass" is quite a different thing than to call him 'mulish.' Vide the lexiocographers.

Furthermore, the very word "jackass" is a term of reproach everywhere, as in the literature of the law. Do we not all know that a certain phase of the law of negligence, the humanitarian rule, first announced, it has been said, in a donkey case (Davis v. Mann, 10 Mees. & W. 545) has been called, by those who deride it, the 'jackass doctrine?' This on the doctrine of the adage: Call a dog a bad name and then hang him. But, on the other hand, to sum up fairly, it was an ass that saw the heavenly vision even Balaam, the seer, could not see. and first raised a voice against cruelty to animals. Num. 22:23 et seq. So, did not Sancho Panza by meditation gather the sparks of wisdom while ambling along on the back of one, that radiated in his wonderful judgments pronounced in his decision by the common-sense rule of knotty cases in the Island of Barataria? Did not Samson use the jawbone of one effectually on a thousand Philistines? Is not his name imperishably preserved in that of the fifth proposition of the first book of Euclid—the pons asinorum? But we shall pursue the subject no farther. Enough has been said to show that the ass is not without some rights in the courts even on sentimental grounds; ergo, if his hybrid son, tracing his lineage as he does to the Jacks of Kentucky and Andalusia, inherits some of his traits, he cannot be held bad, per se. Q. E. D.

It is meet that a $5 case, having its taproot in anger (and possibly in liquor), should not drag its slow lengths through the courts for more than five years, even if it has earned the soubriquet of 'the celebrated mule case.'

The premises herein and in the opinion of Brother GRAVES all in mind, I concur.

ITEMS OF PROFESSIONAL INTEREST.

NEWS FROM CONTINENTAL EUROPE—GERMAN WAR LEGISLATION.

By ordinance of September 23, 1914, did the kaiser temporarily delegate to the governor of Elsasz-Lothringen certain of his duties, mostly appointments and discharges of public officers, granting of certain pardons and in general, the transaction of pressing business.

It appears that later similar temporary duties have been put on the chancellor of the empire.

It has been enacted that no securities may be sold at forced sale, unless they bring at least the minimum price paid during the week ending July 31, 1914. As to all other things, at least one-half of the appraised value must be obtained.

In order to make it possible for limited partnerships and similar organizations (Gesellschafte mit begrenzter Haftung) to hold lawful meetings during the war, notwithstanding the absence in the field of a majority of the members, the courts have been given powers to appoint proxies for such absentees.

Under the law, the so-called "Genossenschaften" must have all of their affairs audited at least once in every two years. It appears that the great majority of expert accountants have gone to war, and that it is difficult to have proper audits made. A law of September 8, 1914, has granted an extension of four months. Most of the emergency legislation has evidently been enacted upon the supposition that the war will be over by next spring. March 31, 1915, is the date of expiration of a great many of the measures; the others just call themselves temporary and leaves it in the discretion of the administration to abrogate them when not needed any longer.

In order to reduce law suits to a minimum, commissions of conciliation have been organized, particularly to settle disputes among merchants and manufacturers, and among landlords and tenants. Many of these commissions, or perhaps all of them, have come into existence spontaneously, without any direction or request from the public authorities.

The ministers of justice of Prussia and of Baden have memoralized all referees in bankruptcy, urging them to expedite all proceedings in bankruptcy and to try to obtain compositions.

The Prussian minister of the interior has urged all administrative officers to avoid quarrels about the extent of their authority and, where such is not possible, to exert themselves to have them settled out of court.

Among the soldiers sent to the front were a number having been sentenced for some offense. All of these have been pardoned. There were also a number having been accused of offenses. Upon their return prosecutions would stare them in the face. All district attorneys have been advised by the department of justice to let all such prosecutions rest until covered by the various statutes of limitations.

England has prohibited all commerce with Germany. Germany has not gone that far. Trade with England and her colonies is lawful, but payment of debts due them was prohibited by an act of September 30, 1914. It does not cancel the obligations incurred, but prohibits their solution while the war lasts.

After Generals Paul von Beckendorff and von Hindenburg had driven the Prussians out of East Prussia, he was created a doctor juris honoris causa by the University of Koenigsberg; his diploma reads: Qui Moscovitorum copiis fusis fugatis profligatis Borusiae orientalis patrium solem humanitatemque Germanicam ab hostili Barbarie defendit ac tutatus est immortali patriae decori.

In order to provide work, not only for factory workers having become idle because of the war, but also and especially for the hundreds of thousands of war prisoners, so that they may help earn their keep, a great many public works have been started. Heretofore, a very great deal of red tape had to be wound and unwound before such works could get under way, and a great deal of time was lost. The necessary proceedings in this respect have been materially simplified through various Acts of September 2, 1914, October 17 and 22, 1914.

An Act of September 2, 1914, practically continues all legal proceedings in the civil courts against men actually serving at the front.

The main features of the Austrian moratorium is that it gives sixty days' grace in all cases. It is still in force and has been extended. There are, however, a number of exceptions, particularly claims for wages and salaries which must be paid when due. Interest on mortgage loans must also be paid when due, unless debtor can show that his income from the property, after payment of taxes and other public charges, has been insufficient to meet the interest charge.

AXEL TEISEN.

Philadelphia.

ARE "JUSTICE" AND "LAW" SYNONYMOUS TERMS?

One paragraph of President Wilson's address to the last meeting of the American Bar Association, at Washington is going the rounds of the secular press and creating much comment. This is the quotation:

"I once said to a lawyer with whom I was discussing some question of precedent and in whose presence I was venturing to doubt the rational validity at any rate of the particular precedents he cited. 'After all isn't our object justice?' And he said, 'God forbid! We should be very much confused if we made that our standard. Our standard is to find out what the rule has been and how the rule that has been applies to the case that is.' I should the circumstances of man actually are and what the impulses of justice necessarily are."

The lawyer from whom our worthy president has quoted had indeed a very narrow vision and hardly represents any but the most ultra conservative members of the bar. We do not believe that reverence for the past keeps the courts from "looking about" and discovering new principles of justice or at least new applications of old principles of justice upon which to base a rule of law that will work out exact justice in the case at bar. And more than one supreme court justice has confessed that "impulses of justice" with respect to some particular case at bar has often been responsible for straining the tension of old rules of law almost to the breaking point.

Our courts aim at "justice." That is an unconscious standard in any normal mind when dealing with the rights of others. The difficulty which the courts often have to confront is how to get outside of the limitations of a statute or a former decision in order to do justice as they conceive it.

But it must always be remembered by critics of the judiciary that they labor sometimes in very close cases under a very embarrassing situation, to-wit, their conception of what justice in the particular case demands and their conception of what the law really is, which they are sworn to uphold. Between their conscience on one side and their oath on the other, and they often fall upon the Scylla of public opinion in seeking to avoid the Charybdis of their own consciences.

MEETING OF AMERICAN BAR ASSOCIATION.

The next meeting of the American Bar Association will be held August 17, 18 and 19, 1915, at Salt Lake City, Utah.

This matter was decided at the meeting of the executive committee, held in New York on January 9, 1915.

The prospects for a large attendance are encouraging and especially reassuring to the committee by reason of the fact that Salt Lake City is one of the sight seeing places of this country on the way to the Panama Exposition at San Francisco.

We not only congratulate the bar of Salt Lake City on this signal honor, but the bars of all the great Western States should unite

BOOKS RECEIVED

A Treatise on the Law of Income Taxation under Federal and State Laws. By Henry Campbell Black, author of Black's Law Dictionary and of Treatises on Judgments, Bankruptcy, Constitutional Law, Interpretation of Laws, Judicial Precedents, etc. Second edition. Price, $5.00. Vernon Law Book Company, Kansas City, Mo., 1915. Review in this issue.

A History of French Public Law. By Jean Brissaud, late professor of legal history in the University of Toulouse. Translated by James W. Garner, professor of political science in the University of Illinois. With introductions by Harold D. Hazeltine, reader in English law in Cambridge University; and by Westel W. Willoughby, professor of political science in Johns Hopkins University. Price, $4.50. Boston, Little, Brown & Co., 1915. Review will follow.

The Individual Delinquent. A text book of diagnosis and prognosis for all concerned in understanding offenders. By William Healy, A. B., M. D., director of the Psychopathic Institute, Juvenile Court, Chicago, Associate Professor Mental and Nervous Diseases, Chicago Policlinic. Price, $5.00. Boston, Little, Brown & Co., 1915. Review will follow.

BOOK REVIEWS.

BLACK ON INCOME TAXES—SECOND EDITION.

A review of the first edition of the above work appeared in 77 Cent. L. J. 335, and now appears the second edition. Our former review concerned a book on the law just passed when, of course, there were no adjudications or departmental rulings in regard to its application.

This edition comes after a year of trial of the law, and shows the regulations and rulings of the treasury department of the government all sections numbered and that department's digest and synoptical arrangement.

The text of the former edition has been to a large extent rewritten in the light of development in the administration of the law, and the officially prescribed forms are given in the book.

This book is comprehensive in treatment and of invaluable benefit to practitioners in advising as to the making of proper returns under

HUMOR OF THE LAW.

A lawsuit was recently in full swing, and during its progress a witness was cross-examined as to the habits and character of the defendant.

"Has Mr. March a reputation for being abnormally lazy?" asked counsel briskly.

"Well, sir, it's this way—"

"Will you kindly answer the question asked?" struck in the irascible lawyer.

"Well, sir, I was going to say it's this way. I don't want to do the gentleman in question any injustice, and I won't go so far as to say, sir, that he's lazy, exactly; but if it required any voluntary work on his part to digest his food—why, he'd die from lack of nourishment, sir."—Everybody's.

During the flood of 1913, Lima received her share of the overflowing waters of the Ohio. The streets turned into rivers.

A dripping man, who apparently was suffering from an oversupply of wet goods inside as well as out, staggered into a blacksmith shop. With a thick voice he asked for a monkey-wrench, and, getting one, waded back into the street.

He was arrested later standing in three feet of water, working over a hydrant.

"Say, what are you doing there?" called the policeman.

The drunk paused, braced himself against the current, and called back with true civic pride: "Officer, somebody's—hic—got to shut this water off. We can't—hic—waste it like this."—Everybody's.

From Fenimore Cooper and other authorities we have gained the impression that the Indian is a stolid, severe individual, with no sense of the white man's humor, but one red brother showed himself quite a civilized joker the other day in the United States Court at St. Paul. He was a witness in a hotly contested case, and a lawyer was after him in the most approved style to cast discredit on his testimony. After apparently frightening the Indian with the awful consequences which would follow the slightest deviation from the truth, the lawyer solemnly said:

"Now, sir, I want you to tell me the exact truth, without any shuffling or evasion. I want you to look me square in the eye and

WEEKLY DIGEST.

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Abatement and Revival**—Pendency of Another Suit.—Pendency of a suit on a claim will not prevent the same claim from being used as a set-off in another action, nor will a set-off create a bar to a suit in the same court on the same claim.—National Metal Edge Box Co. v. American Metal Edge Box Co., Pa., 92 Atl. 42.

2. **Assault and Battery**—Drunken Man.—Where a saloon keeper removed a drunken man from the barroom, placing him in a small room and locking the door, he is guilty of an assault and battery; the intoxicated man not being able to look out for himself.—Grenier v. O'Gara, Mass., 106 N. E. 563.

3. **Attachment**—Damages.—It is no defense to a claim for actual damages from wrongful attachment that the plaintiff in attachment had probable cause to believe that ground for attachment existed.—Fisher v. Scherer, Tex., 169 S. W. 1133.

4.——Grounds of.—An attachment must stand or fall according to the facts existing at the date of its issuance, and cannot be based on a subsequent event.—Brady-Neely Grocer Co. v. De Foe, Tex., 169 S. W. 1135.

5. **Bankruptcy**—State Insolvency Law.—The federal Bankruptcy Act of 1898 superseded state insolvency laws in so far as they relate to the same subject-matter and affect the same persons; hence state courts should not assume jurisdiction of a general assignment for creditors within four months after the date of the bankrupt, made full disclosure as to his security in the bankruptcy proceedings, and the bankrupt in effect denied any interest in the mortgaged property, the proving of the claim against the bankrupt and the receipt of a dividend thereon did not constitute a waiver of the mortgage.—P. Ballantine & Sons v. Fenn, Vt., 92 Atl. 3.

8. **Banks and Banking**—Agency.—If money is left with a bank to be loaned, the bank is an agent, not a debtor, and if the bank lends the money in good faith and exercises due care, it is not liable for loss.—Chapman v. First Nat. Bank of Roseburg, Ore., 143 Pac. 630.

9. **Beneficial Associations** — Expulsion of Member.—The power to expel a member of a beneficial association can be conferred only by the association's charter, and not by a by-law.—Macavicza v. Workingman's Club of Plymouth, Pa., 92 Atl. 41.

10. **Bills and Notes**—Defenses.—Whenever a defendant can maintain a cross-action for damages for plaintiff's noncompliance with his part of the contract, he may in an action upon a note given in consequence of the contract set up such claim as a defense.—Dutton v. Million, Ark., 169 S. W. 1183.

11.——Execution.—That one who signed a note as surety signed the name of her principal without authority does not make such surety the principal.—Mutual Benefit Life Ins. Co. v. First Nat. Bank, Ky., 169 S. W. 1028.

12.——Novation.—The execution of a new note in place of an old one, to which the wife of one of the signers added her name as surety, does not constitute a novation and discharge the old obligation.—Mutual Benefit Life Ins. Co. v. First Nat. Bank, Ky., 169 S. W. 1028.

13. **Boundaries**—High Water Mark.—"High-water mark" of a non-navigable stream, called for as a line in a deed, is the line to which the river has destroyed vegetation and rendered the land unfit for meadow or cultivation.—Ephraim Creek Coal & Coke Co., v. Brogg, W. Va., 83 S. E. 190.

14.——Office Survey.—That a survey was merely an office survey may be established by circumstantial evidence.—McSpadden v. Vannerson, Tex., 169 S. W. 1079.

15.——Oral Agreement.—A disputed boundary line between coterminus owners may be established by an oral agreement accompanied by actual possession to the agreed line or otherwise duly executed.—Bunger v. Grimm, Ga., 83 S. E. 200.

16. **Carriers of Goods**—Damages. — Where goods were sold at a stipulated price if they arrived on schedule time, but the carrier was not informed of the contract, the measure of damages for delay is the difference between the market price of the goods when they should have arrived and when they did.—Southern Pac. R. Co. v. A. J. Lyon & Co., Mass., 66 So. 209.

maintain its platforms ina reasonably safe condition for use by a passenger exercising ordinary care.—Polland v. Grand Trunk Ry. Co. of Canada, Me., 92 Atl. 38.

19.——Res Ipsa Loquitur.—Plaintiff's evidence that an electric car started with a "terrible jerk," together with testimony of injury, held not to sustain the burden of proof; the principle of res ipsa loquitur being inapplicable.—Griffin v. Springfield St. Ry. Co., Mass., 106 N. E. 551.

20. **Champerty and Maintenance**—Adverse Possession.—A conveyance made at a time when the land was in the actual adverse possession of defendants and largely under fence, held champertous under Ky. St. § 210.—Begley v. Valentine, Ky., 169 S. W. 1026.

21.——Eminent Domain.—Where land is condemned, a contract between the landowner and his attorney to pay the latter a percentage of the damages recovered is not champertous, where the parties assumed that some compensation would inevitably be recovered.—Taylor v. Rosenberg, Mass., 106 N. E. 603.

22. **Chattel Mortgages**—Passing of Title.—Under a provision in a contract of sale against passing title to the buyer until after payment in full, the title passes and the transaction becomes a sale with a mortgage back.—Montenegro-Riehm Music Co. v. Beuris, Ky., 169 S. W. 986.

23.——Renewal Note.—A renewal note reciting that it was given only to extend original conditional sale note did not extinguish the old note so as to postpone it to an intervening mortgage given by the vendee.—Carlton Supply Co. v. Battle, Ga. 83 S. E. 225.

24. **Commerce**—Intoxicating Liquors.—One who sells intoxicating liquors solely in interstate commerce does not violate local prohibitory laws because he did not purchase his liquors in interstate commerce; the sale and not the purchase of liquors being prohibited.—State v. Chadwell, Tenn., 169 S. W. 1170.

25. **Compounding Felony**—Precedent Proof.—Proof of actual commission of a felony is essential to a conviction of compounding it.—Hays v. State, Ga., 83 S. E. 236.

26. **Contracts**—Acceptance.—Where a landowner, who knew little about wells, accepted one dug by plaintiff, relying upon his superior knowledge and skill, such acceptance does not preclude the landowner from setting up that the well was not properly constructed.—Dutton v. Million, Ark., 169 S. W. 1183.

27.——Duress.—A contract is procured by duress, where the maker was so acted on by threats of the person claiming the benefit of the contract as to be bereft of that quality of mind essential to the execution of a contract.—Piekenbrook v. Smith, Okla., 143 Pac. 675.

28. Corporations—Preference. — Pledge by an insolvent corporation to a bank of notes given for the price of land, as security for the

29.——Rescission. — Where a corporation agreed to sell stock to plaintiff and to give him employment wrongful discharge of plaintiff entitled him to rescind and recover the amount paid for the stock.—Brown v. National Electric Works, Cal., 143 Pac. 606.

30.——Surrender of Franchise.—Corporate action is necessary to the surrender of a franchise by a public service corporation.—Town of Gassaway v. Gassaway Gas Co., W. Va., 83 S. E. 189.

31. **Courts**—Jurisdiction.—Where want of jurisdiction of defendant did not appear on the face of the petition, and was not raised by special demurrer or by a plea in abatement or motion to quash, and defendant's answer presented a defense on the merits, the right to object was waived.—Gainesboro Telephone Co. v. Buckner, Ky., 169 S. W. 1000.

32. **Criminal Evidence** — Instructions. — Where evidence, though competent, was calculated to prejudice accused by an improper use by the jury, it should have been instructed as to its legitimate bearing and cautioned not to be influenced thereby, except as far as it was relevant.—State v. Pollard, N. C., 83 S. E. 167.

33. **Criminal Law**—Argument of Counsel.—A conviction obtained in violation of the rules respecting the argument of counsel will be set aside on appeal.—Stroud v. Commonwealth, Ky., 169 S. W. 1021.

34.——Argument of Counsel.—It was improper for accused's counsel in his argument to refer to what he personally knew regarding the location and surroundings of the scene of the crime.—State v. Rodgers, N. C., 83 S. E. 161.

35.——Former Jeopardy.—Where accused was acquitted in a prosecution before a justice, such acquittal will not constitute former jeopardy, where procured through collusion between accused and the justice.—Brackney v. State, Ind., 106 N. E. 532.

36.——Suspension of Sentence.—Where the verdict of guilty failed to recommend suspension of sentence, the court could not suspend it.—Johnson v. State, Tex., 169 S. W. 1151.

37.——Withdrawal of Instructions.—A mere withdrawal of an instruction after the jury has retired need not be in writing.—Robinson v. State, Ind., 106 N. E. 533.

38. **Criminal Trials**—Newly-Discovered Evidence.—A new trial will not ordinarily be granted because of newly-discovered evidence tending merely to impeach the prosecutrix.—State v. Folden, La., 66 So. 223.

39. **Damages**—Remote. — Remote damages are such as are the unusual result, not reasonably to be anticipated, from unusual circumstances over which the negligent party has no control.—Chambers v. Everding & Farrell, Ore., 143 Pac. 616.

40. **Deeds**—Description.—A deed must set forth a subject-matter, either certain in itself or capable of being reduced to a certainty by a reference to something extrinsic to which it re-

42.——Infant Heir.—An agreement between the others entitled to share in the estate of the deceased person is not binding on an infant heir.—Alsobrook v. Orr., Tenn., 169 S. W. 1165.

43. **Divorce**—Burden of Proof.—In suit for divorce, burden held to be on wife to prove that husband was of sufficient ability, and that his neglect to provide maintenance was wanton and cruel.—Keenan v. Keenan, Mass., 106 N. E. 568.

44.——Custody of Children.—Where a parent awarded the custody of children in divorce proceedings becomes unfitted for the trust, third persons may, by petition, intervene in behalf of the children.—Stone v. Duffy, Mass., 106 N. E. 595.

45.——Non-Support.—A divorce for non-support held properly refused, where plaintiff's own income was ample for her supoprt, and she did not request her husband to support her during their separation.—Baker v. Baker, Cal., 143 Pac. 607.

46. **Domicile**—Naturalization. — Naturalization of an alien is not conclusive of domicile in the country of his adoption, since citizenship or nationality and domicile involve different principles.—In re Mesa's Estate, 149 N. Y. Supp. 536.

47. **Elections**—Open Ballots.—Ballots voted openly on the table by voters who were not sworn as to their disability cannot be counted. —Allen v. Griffith, Ky., 169 S. W. 1003.

48. **Eminent Domain** — Riparian Owner. — That a riparian proprietor maintained a prior action, where the defendant municipality took land on a brook which caused some interference with his riparian rights, is not defense to a subsequent action for the diversion of all of the waters of a brook, but merely goes to the amount of damages recoverable in the second proceeding.—Stevens v. City of Worcester, Mass., 106 N. E. 587.

49. **Estoppel**—Statutory Action.—The doctrine of equitable estoppel will not be applied in aid of an action by a landlord to enforce a special statutory right for three times the amount of rent actually due.—Bolitho v. East, Utah, 143 Pac. 584.

50. **Evidence**—Judicial Notice.—The court can take judicial notice that the dispatch with which the business of railroad is conducted does not admit of trains coming to a full stop at junction points, but that signals have been devised by which the approaching engineer may be advised whether the track is clear.—Finnegan v. Missouri Pac. Ry. Co., Mo., 169 S. W. 969.

51. **Executors and Administrators**—Divestiture.—If a will does not devise land, though it creates a power in the executors to sell it, the estate of the heirs is not divested until the execution of the power of sale.—Speed v. Perry, N. C., 83 S. E. 176.

52. **Forcible Entry and Detainer**—Sufferance. —The presence of one by sufferance of his wife in her premises ceases to be such immediately on her death, when the legal title descends to her heirs, and he becomes against them an intruder, as to right of removal by summary proceedings.—Newman v. O'Rourke, 149 N. Y. Supp. 514.

53. **Fraud**—Trust Relation.—A barber who practically represented to plaintiff that he was engaged in finding locations for business, upon whose information plaintiff acted, became plaintiff's agent, establishing a relation of trust and confidence, rendering the barber liable for deceit in representing that a lease of the premises sold to plaintiff would be secured.—Kochler v. Dennison, Ore., 143 Pac. 649.

54. **Garnishment** — Former Indebtedness.— Where an indebtedness to C was transferred by him to another long before writs of garnishment were served on the debtor, the indebtedness was no longer subject to garnishment as the property of C, though the debtor did not know of the transfer.—Amarillo Nat. Bank v. Panhandle Telephone & Telegraph Co., Tex., 169 S. W. 1091.

55. **Gifts**—Intent.—A daughter claiming that money drawn from her mother's bank account was intended as a manual gift must clearly show that such was her mother's intention.— Succession of Housknecht, La., 66 So. 233.

56. **Homicide**—Insanity.—The issue of insanity presents a pure question of fact whether accused was so mentally diseased that he felt impelled to act by a power which overcame his reason and judgment, and was to him irresistible—Commonwealth v. Cooper, Mass., 106 N. E. 545.

57.——Self-Defense.—That accused harbored malice towards deceased, a chief of police, because of real or imagined persecutions, held not to defeat right of self-defense against a dangerous assault.—State v. Pollard, N. C., 83 S. E. 167.

58.——Sudden Passion.—"Influence of sudden passion" means that the provocation must arise at the time of the commission of the offense, that the passion is not the result of a former provocation, and that the act must be directly caused by the passion arising out of the provocation.—Lamb v. State, Tex., 169 S. W. 1158.

59. **Husband and Wife**—Presumption.—Despite the presumption that the name appearing first on a note as an obligor is that of the principal debtor, where it is sought to hold a wife upon notes which she signed with her husband, the courts must look at the substance, and not the form to see that she is not held liable as a surety for her husband's debts.—Mutual Benefit Life Ins. Co. v. First Nat. Bank, Ky., 169 S. W. 1028.

60. **Indemnity**—Acceptance of Benefits. — Where an agent of a corporation secured plaintiff's subscription to the corporation's stock by fradulent representations, and the corporation, with knowledge of the fraud, retained plaintiff's money and notes, it became an active participant in the fraud, and, on being cast in a suit to rescind, could not recover over against the agent.—Commonwealth Bonding & Casualty Ins. Co., v. Bomar, Tex., 169 S. W. 1060.

61. **Infants**—Defense.—Where a minor was designated as a beneficiary in a mutual benefit certificate, on her agreement to collect the proceeds and pay the same to another, her minority was no defense to her obligation to perform the agreement.—Mellville v. Wickham, Tex., 169 S. W. 1123.

62. **Injunction**—Anticipation of Injury.—In an injunction suit brought before a railroad company had sought to exercise the right of expropriation, whether it had such right could not be determined, even with the consent of the railroad company.—Mansfield Northeastern R. R. Co. v. Nabors, La., 66 So. 229.

63.——Enforcing Ordinance.—Equity may enjoin public officers from taking action injurious to property rights under a void ordinance. —Greene v. Cook, Mass., 106 N. E. 573.

64.——Jurisdiction.—An owner not objecting to a petition for a drainage district, and appealing may, nevertheless, on bill to enjoin the issuance of bonds of the established district, question the court's jurisdiction, where such question was one of law to be determined from an inspection of the record.—Hardee v. Brooks, Miss., 66 So. 216.

65.——Libel.—Where no breach of trust or of a contract appears, a bill will not lie to enjoin the publication of libelous statements injurious to plaintiff: his remedy being an action for damages.—Finish Temperance Society Sovittaja v. Riavaaja Publishing Co., Mass., 106 N. E. 561.

66.——Limits of Writ.—Person employed to establish card index system, who carried away a copy of the indices, held properly enjoined from using such copy or information thereby obtained; but the injunction must specify the information or secrets he was not to use.—Oxypathor Co. v. De Cordero, 149 N. Y. Supp. 513.

67. **Insane Persons**—Voidable Contract.—The deed of one mentally unsound is not necessarily void, but is only voidable, and, unless there was unfairness or injustice, such as inadequate consideration, etc., the deed should not be set aside.—Lexington & E. Ry. Co. v. Napier's Heirs, Ky., 169 S. W. 1017.

68.——Voidable Contract.—Where insured, though knowing the effect of his act, was induced, by an insane delusion that his children were about to murder him for his insurance, to surrender his policies in consideration of payment of the surrender value, such surrender was voidable after his death at the instance of his personal representatives.—New York Life Ins. Co. v. Hagler, Tex., 169 S. W. 1064.

69. **Insurance**—Accident.—Where person, in using nasal douche, sniffed more violently than usual, drawing germs into the middle ear, whence they penetrated into the brain, causing spinal meningitis, held that there could be no recovery under a policy insuring against death from injuries effected through external violent, and accidental means.—Smith v. Travelers' Ins. Co., Mass., 106 N. E. 607.

70.——Adopted Children.—"Adopted children," as used in a law of a beneficial association authorizing the making of adopted children beneficiaries, held to include the foster mother of the insured, whom he had legally adopted as his heir.—Mellville v. Wickham, Tex., 169 S. W. 1123.

71.——Process.—A party suing a foreign insurance company has an option to serve process upon the insurance commissioner or upon the agents of the foreign company.—Mutual Benefit Life Ins. Co. v. First Nat. Bank, Ky., 169 S. W. 1028.

72.——Reinstatement.—On an issue as to insured's health at his reinstatement, statements by the beneficiary were admissible in favor of defendant.—Supreme Tribe of Ben Hur v. Cosgrove, Ky., 169 S. W. 999.

73. **Intoxicating Liquors**—Clubs.—A sale of liquor belonging to an incorporated club made by an employe of the club to members thereof does not come within the rule that the distribution among the members of a joint association of liquors purchased for them is not a sale.—Commonwealth v. Woelz, Mass., 106 N. E. 560.

74. **Judgment**—Process.—The supreme court acquires no jurisdiction in an action against a non-resident for a money judgment, by personal service outside of the state.—Jacobs v. White, 149 N. Y. Supp. 500.

75.——Res Judicata.—A former judgment between the parties is conclusive, in all subsequent actions involving the same question, as to all matters belonging to the subject of the controversy, and properly within the issues which might have been raised and determined.—Southern Pac. Co. v. Edmunds, Cal., 143 Pac. 597.

76. **Jury**—Disqualification.—That a juror had loaned money to another to pay counsel assisting in the prosecution did not disqualify him from serving as a juror.—Bird v. State, Ga., 83 S. E. 238.

77. **Landlord and Tenant**—Estoppel.—When the owner of a paramount title, having a present right of possession, demands possession, the tenant may yield possession, and is not estopped to deny the landlord's title.—Stanley v. Topping, Ore., 143 Pac. 632.

78.——Eviction.—As between a landlord and tenant, an eviction must be due to some wrongful act on the part of the landlord, depriving the tenant of the beneficial enjoyment of the premises.—Taber v. Van Pelt, 149 N. Y. Supp. 487.

79. **Libel and Slander**—Joint and Several Liability.—Where a number of persons working together to a common end publish a libel, they are jointly liable as well as severally.—Finish Temperance

ant; it not being a stock dividend, though for convenience payment was made in notes, rather than in actual money.—Boston Safe Deposit & Trust Co. v. Adams, Mass., 106 N. E. 590.

81. **Limitation of Actions**—Overdraft by Partner.—The charging of overdrafts by a partner to profit and loss, and the striking of the balance due from him, which was carried forward to the following year, was not an account stated, and does not begin to run against an action for such overdrafts until the dissolution of the firm.—McMahon v. Brown, Mass., 106 N. E. 576.

82. **Master and Servant**—Independent Contractor.—That an aviator, who was giving exhibitions at a fair, was an independent contractor, and was negligent in handling his machine, does not relieve the fair association from liability, if it also was negligent.—Platt v. Erie County Agricultural Society, 149 N. Y. Supp. 520.

83.——Obvious Danger.—An employe not engaged in making a reasonably safe place dangerous, or an obviously dangerous place safe, was not, as a matter of law, when injured by its condition injured by a risk incident to his employment.—Chicago, R. I. & P. Ry. Co. v. Townes, Okla., 143 Pac. 680.

84.——Presumption.—In an action for the wrongful death of a servant run down by a motor car in a mine, there is no presumption either that the servant was guilty of negligence or that those in charge of the car were negligent.—Linard's Adm'r v. Interstate Coal Co., Ky., 169 S. W. 1006.

85.——Proximate Cause.—Where a servant in the exercise of ordinary care while trying to save a bundle of laths from a saw, pushed too hard against the laths, in view of the weak support afforded by a block which a superior had negligently failed to wedge, fell against the saw, the negligence was the proximate cause of the injury.—Pine Mountain Mfg. Co. v. Bishop, Ky., 169 S. W. 1010.

86.——Usage.—A usage of an employe of a railroad company may be shown to be at variance with a rule when the company has knowledge of such usage, and the knowledge may be implied from the notoriety of the custom or inferred from circumstances.—Finnegan v. Missouri Pac. Ry. Co., Mo., 169 S. W. 969.

87. **Mechanics' Lien**—Waiver.—A contractor's bond against sub-contractors' liens does not waive the lien of the contractors themselves.—Maynard v. Lange, Ore., 143 Pac. 648.

88. **Mortgages**—Bidder at Sale.—A plaintiff who bids in the property at foreclosure may be compelled to complete his purchase by paying the referee's fees and expenses and taking the deed.—Brighton Heights Development Co. v. Interboro Home Builders' Co., 149 N. Y. Supp. 496.

89. **Municipal Corporations**—Abutting Owner.—The right granted by an abutting owner to a water company to lay water pipes in a street was subordinate to the right of the public to compel the removal of the pipes, when necessary to enable the city to construct a subway in the street.—Moffat v. City and County of Denver, Colo., 143 Pac. 577.

90.——Competitive Bidding.—That a street is directed to be paved with a patented article does not necessarily prevent competitive bidding.—Whitmore, Rauber & Vicinus v. Edgerton, 149 N. Y. Supp. 508.

91.——Indictment.—Where a municipal corporation allows its streets to get out of repair or become obstructed so as to be a public nuisance, its officers are liable to indictment.—Southern Ry. Co. v. State, Tenn., 169 S. W. 1173.

92. **Negligence**—Assumption of Risk.—The defense of assumption of risk can be invoked only in cases between master and servant.—Furbeck v. I. Gevurtz & Son, Ore., 143 Pac. 654.

93.——Proximate Cause.—The owner of a store, to which entrance was had through a swinging door, is not liable for an injury to a corporation, the right of one partner to an accounting, and the payment of the balance due him from the other is not an asset of the partnership.—McMahon v. Brown, Mass., 106 N. E. 576.

95. **Party Walls**—Covenants.—Under Civ. Code 1910, § 4192, a party wall agreement contained in deeds by tenants in common of two adjoining lots, constituted a covenant running with each lot.—Horne v. Macon Telegraph Pub. Co., Ga., 83 S. E. 204.

96. **Principal and Surety**—Contribution.—Where a negotiable note is paid after maturity to a holder in due course by a surety, failure of consideration is no defense in an action for contribution by a surety against his cosurety. —Cummins v. Line, Okla., 143 Pac. 672.

97.——Discharge.—A supplemental contract, providing for submission to arbitration of any disputed question as to what constituted extras, did not discharge the surety on the contractor's bond, though the original contract provided that payments for extras should be made monthly.—Massachusetts Bonding & Ins. Co. v. Realty Trust Co., Ga., 83 S. E. 210.

98. **Process**—Defined.—The word "process" includes the means whereby a court compels the appearance of the defendant before it or a compliance with its demands, and is not restricted to mesne process. In a restricted sense it means those mandates of the court intending to bring parties into court or to require them to answer proceedings there pending.—Cloquitt Nat. Bank v. Poitivint, Ga., 83 S. E. 198.

99. **Railroads**—Trespassers.—If, after notices forbidding trespass were posted by a railroad, the people continued to use a bridge as a footway with the railroad's knowledge and without objection, a jury may find that the company acquiesced in the use, notwithstanding the notice.—Doyle v. Portland Ry., Light & Power Co., Ore., 143 Pac. 623.

100. **Release**—Valid.—A release of a claim for damages for personal injuries, executed while a party was in a semiconscious condition to such an extent that he did not know what he was doing, was not binding upon him.—Texas & P. Ry. Co. v. Hubbard, Tex., 169 S. W. 1058.

101. **Replevin**—Special Property.—Where the defendant in replevin claims only a special interest in the property under an attachment, a judgment for the defendant should state the value of the property and also the value of defendant's interest therein.—Bolitho v. East, Utah, 143 Pac. 584.

102. **Sales**—Acceptance.—Where a buyer of machinery accepts it in a defective condition and undertakes to place it in good condition at the cost of the seller, he becomes liable for the price, less his necessary expenditure.—Southern Gas & Gasoline Engine Co. v. Adams & Peters, Tex., 169 S. W. 1143.

103.——Conditional Sale.—Where a contract of conditional sale contains no provision that, on default by the buyer, prior payments shall be forfeited, if the seller retakes the property, the payments made, less damages sustained by the seller, may be recovered by the buyer.—Quality Clothes Shop v. Keeney, Ind., 106 N. E. 541.

104.——Executory Agreement.—An executory agreement for the sale of goods to be delivered at a future date is valid.—Robson & Evans v. N. J. Weil & Co., Ga., 83 S. E. 207.

105.——Implied Warranty.—Where defendant sold plaintiff an automobile under an implied warranty that it was fit for a particular service, a breach of warranty held ground for rescission.—International Harvester Co. of America v. Porter, Ky., 169 S. W. 993.

106. **Set-Off and Counterclaim**—Counterclaim. —In action for conversion of furs alleged to have been delivered to defendant for stor-

tending party, and will not apply where, to sustain defendant's claim, it is necessary to show that plaintiff has no right of action.—Hoover Commercial Co. v. Humphrey, Miss., 66 So. 214.

108. **Specific Performance**—Bond for Title.—Where title to land was taken in the name of defendant's ancestor, who gave a bond for title to S in order to defraud the latter's creditors, and the rights under the bond passed by quitclaims to plaintiff's ancestor, his rights were based on the bond, which was independent of any fraud on the creditors of S, and was enforceable without reference to the consideration passing between the intervening parties.—Taft v. Henry, Mass., 106 N. E. 553.

109. **Taxation**—Salary of State Officer.—The United States government cannot tax the salary of any state functionary.—City of New Orleans v. Salmen Brick & Lumber Co., La., 66 So. 237.

110. **Telegraphs and Telephones**—Common Carrier.—A telephone company is a "common carrier."—Gainesboro Telephone Co. v. Buckner, Ky., 169 S. W. 1000.

111.——Mental Anguish.—Where a message announcing the death of the brother of the sender and addressee was negligently delayed, so that the addressee was deprived of the privilege of attending the funeral, both the sender and the addressee were entitled to recover for mental anguish.—Betts v. Western Union Telegraph Co., N. C., 83 S. E. 164.

112. **Venue**—Undue Influence.—That plaintiff is personally popular in the county where suit is brought, and has numerous relatives there, does not constitute undue influence authorizing a change of venue within Ky. St. § 1094.—Louisville & N. R. Co. v. Netherby, Ky., 169 S. W. 883.

113. **Vendor and Purchaser**—Lis Pendens.—Notwithstanding the failure to file a lis pendens notice of an attachment or execution, subsequent purchasers claiming superior rights must be bona fide purchasers, and take notice of persons in possession.—Daniel v. Holtclaw, Ky., 169 S. W. 1013.

114. **Waters and Water Courses**—Water Company.—While a water company is obliged to furnish water to each abutting owner along the line of its mains, it cannot be compelled to extend its mains at the request of individual users.—Watson v. French, Me., 92 Atl. 290.

115. **Wills**—Construction. — A remainder to testator's daughter during her natural life and at her death to her "nearest blood relative" vested in her but a life estate; the words "nearest blood relative" not being synonymous with "heirs," so as to pass a fee under the rule in Shelley's Case.—Miller v. Harding, N. C., 83 S. E. 25.

116.——Contingent Interest.—Where it does not clearly appear from a will or the circumstances of its execution that a contingent interest was intended, the remainder will be regarded as vesting at testator's death, and not at the expiration of a life tenancy.—In re Bach's Estate, Pa., 92 Atl. 304.

117.——Distribution.—Where testator declared that his property should be divided between S and I and the three daughters of G, and the five devisees were his nieces, the division must be per capita.—Justice v. Stringer, Ky., 169 S. W. 836.

118.——Insane Delusion.—An insane delusion is a belief which springs spontaneously from a diseased or perverted mind, without reason or without foundation in fact.—Coffey v. Miller, Ky., 169 S. W. 852.

119.——Limitation Over.—In a devise to a granddaughter to be given to her at her majority or marriage, but, if she died before that or without heirs, to be given to a grandson, the limitation over applies if the granddaughter dies without heirs after the property has been turned over to her.—Johnson v. Powell, Ky., 169 S. W. 1009.

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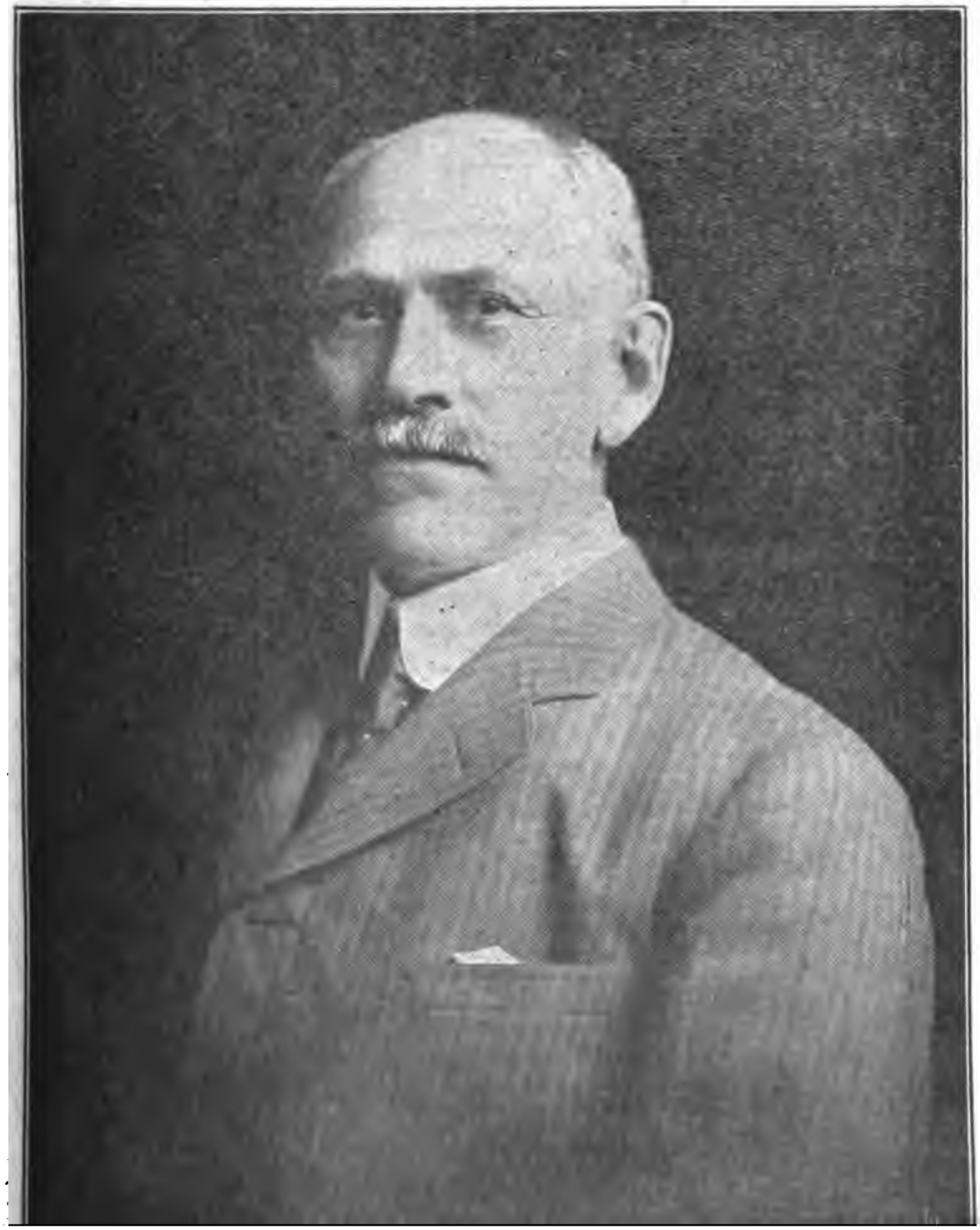

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Central Law Journal.

ST. LOUIS, MO., FEBRUARY 5, 1915.

ENFORCING FOREIGN DECREE FOR DIVORCE THOUGH IT NULLIFIES HOME JUDGMENT FOR NON-SUPPORT.

Where a judgment is rendered without jurisdiction over the person, it is undoubtedly true and often has been decided, that it will not be enforced in a foreign jurisdiction against defendant.

And where jurisdiction of the *res* is obtained by fraud of a plaintiff, in constructive or other service of defendant, it would seem that the judgment or decree could be resisted as fully abroad, notwithstanding the faith and credit clause of the Constitution, as where there was no jurisdiction to render a personal judgment for want of actual personal service on defendant. In neither case would any finding of facts by the court rendering the judgment be binding abroad.

But jurisdiction of the person or of the *res* being conceded, may a foreign court go into the proof of the merits of a case as presented to the court rendering a judgment?

The facts in a divorce case as reported in Connecticut Supreme Court of Errors show that defendant pleaded a decree of divorce already rendered in a South Dakota Court. The plea was allowed by the trial court and affirmed by a majority in the Supreme Court of Errors. Gildersleeve v. Gildersleeve, 92 Atl. 684.

There is a full recital of the facts so far as important to our inquiry in the dissenting opinion by one of the court: though subsequently by judicial decree acknowledging the paternity; that after the birth of the child in February, 1894, he provided no support for wife or child; that his wife had him arrested for non-support in August, 1894, and in September, 1894, judgment was suspended upon his agreeing to furnish weekly support; that he continued to furnish this for six months and up to March, 1895; that either late in 1894 or early in 1895 he went West, and reached South Dakota probably in January, 1895, returned to Connecticut in February, 1895, and then returned to South Dakota, and shortly thereafter, and while he was making payments under the suspended judgment, and while he himself was deserting his wife and new born son, he took steps toward beginning an action for divorce in South Dakota; that he brought this late in the fall of 1895, and less than a year after he reached South Dakota, and obtained the divorce January 11, 1896, and returned to New Haven shortly thereafter. It is clear that Mr. Gildersleeve went to South Dakota to obtain a divorce and escape the penalty liable to be imposed by the Connecticut court for non-support. It is also clear that the ground of his action was absolutely nonexistent, but this issue is not raised upon the pleadings."

The majority opinion confines its attention to the question of comity as to the grounds of the decree for desertion as being or not opposed to public policy and good morals in Connecticut, most probably for the reason as stated by the dissenting judge that no issue as to the Connecticut judgment for non-support was raised upon the pleadings.

But did this have to be specifically

the South Dakota court was vested with a right inhering in the relation the South Dakota court declared to be dissolved. Is it not stretching comity very greatly for the Connecticut court to declare, in effect, that, by a South Dakota court, judgments in its own state are abrogated?

One of the reasons recited by Minor in his Conflict of Laws, § 5, for a refusal of comity is where the enforcement of a foreign law would involve injustice and injury to the people of the forum. The Supreme Court says this does not apply to this case.

But why does it not apply, if it defeats a vested right in a citizen of the forum? Must the injustice or injury spoken of apply as a principle generally, or may it apply only to one or more citizens of the forum? If the former, the principle is hardly distinguishable from those which prevent recognition of foreign judgments which are against good morals or public policy, also mentioned by Mr. Minor in the same section. If the latter, it hardly seems there could be a plainer case of injustice and injury to one of the citizens of a forum.

Apart from this, however, how may it be imagined, that in constructive service merely anything more may be effected by any judgment therein than disposition of the *res* before a court? It has no ulterior effect by construction or otherwise. The Connecticut court rendered a judgment upon personal service and here it is said its effect is nullified by a decree in constructive service.

There seems also still another question involved. While it may be true, that one acquiring a domicile in another state carment on that *res* so far as obligations thereunder are imposed?

The judgment thus rendered would seem to place on this *res* the quality of a ***ne exeat*** and while locomotion is free and the acquisition of another domicile is free, yet either is exercised in subordination to vested rights as to what accompanies removal.

The *res* in matrimony, though intangible, is greatly like a tangible thing in many respects. If it forms the basis for jurisdiction, it ought to form the basis for the lien of a judgment thereon. And, if it is the ground of judgment in one state, how may a foreign state by its laws dissipate the effect of such judgment?

The only way to answer this is to say, that the acquiring of a domicile in another state so operates and the judgment creditor takes chances of its displacement by exercise of one's right to change. The last analysis of such position is that, even though there be no subsequent divorce in the state of a new domicile, judgment arising out of the relation in the old domicile, ceases to operate. But we greatly doubt whether any court would thus declare. We think we could find cases to the contrary.

NOTES OF IMPORTANT DECISIONS

MOB VIOLENCE—ASSEMBLAGE MAKING MUNICIPALITY LIABLE FOR ITS ACTS.—A statute which makes a municipality liable for the acts of a mob is a harsh statute and ought to receive very strict construction. Such a statute would seem to embrace only an assemblage of men bent upon illegal purposes in defiance of and even to the overcoming of all opposition by civil authorities.

Therefore it seems strange to us for Kansas Supreme Court to hold that a "Kangaroo

the city liable for the whipping. Blakeman v. City of Wichita, 144 Pac. 816.

The Kansas court adverts to former statutes concerning "riotous assembly," and defining "a mob" with reference to lynching, but these only concerned the committing of criminal offenses and not the placing of any responsibility for damage on a city for the acts of a mob.

The mere playing of a prank upon another, when the crowd playing it is not assembled in open defiance of the officers of the law, would seem to have about it little of the spirit of a mob, no matter how many people are engaged in committing the prank. The general peace of the community, which a municipality must maintain to the utmost of its ability, seems no more violated by such an unlawful act, than by a mere affray, if as much. A ruling of this kind seems so opposed to reason and common sense, and adherence to technical definitions as varying from common parlance, that it is difficult to understand how the decision could have been rendered.

A mob is an assemblage of frenzied people, who set out to avenge some wrong or fancied wrong and their purpose is in the way of an insurrection against constituted authority—not to commit a mere trespass against another. Any trespass may be merely an incident of a mob rising, while in the case at bar it is the main intent. It is used by the court to prove the existence of a mob, when often no injury may follow from there being a mob.

ALIENAGE—RIGHT OF RECOVERY UNDER EMPLOYERS' LIABILITY ACT.—In McGovern v. Philadelphia & R. Ry. Co., 35 Sup. Ct. —, XLVII Chicago Legal News 193, it is held that alienage is not a condition affecting recovery under the federal employers' liability act.

Mr. Justice McKenna speaks of diversity of opinion on the subject of recovery under compensation cases for injury for tort and distinguishes as to the federal act as follows:

"Its purpose is something more than to give compensation for the negligence of railroad companies. * * * The rights and remedies of the statute are the means of executing its policy. * * * It is for the protection of life that compensation for its destruction is given and to those who have relation to it."

This is scarcely as clean cut a statement, as one might desire. Instead of saying the purpose "is something more than to give compensation," etc., it seems to us it were better to say its only purpose is imposing a right of action as "the means of executing its policy." Our federal government has no jurisdiction ex. debito justitiae to grant to any citizen a right of action for anything. Private rights and wrongs are exclusively of state cognizance. It seems to us that all recoveries by individuals under federal law, rather ought to be regarded as in the nature of qui tam proceedings in aid of enforcing regulation. Regulation is the only power that is granted by the commerce clause.

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY AS REFERRING TO JURISDICTION OR GROUND OF RECOVERY.—The District Court of Western District of Washington holds that an attachment suit against stockholders of an insolvent company for the purpose of subjecting property in a state to their liability as stockholders is removable by one of them as a non-resident, upon the ground that their liability is joint and several. Wright v. Ankeny, 217 Fed. 985.

In support of this ruling there is cited section 28 of the judicial code which provides that: "When * * * there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants" may remove it. It seems to us that this section in no way refers to separableness. It only gives to one of several nonresidents the right to remove on the presumption that others will not object.

But the court goes on to say that "the liability of each stockholder of an insolvent corporation is a distinct and separable liability which could be pursued by the receivers in separate causes of action." Then the court further adds that "all of the parties are necessary to an adjudication of the conspiracy charged as bearing upon the title to this land * * * and the cause of action being removable upon any phase of legal approach" as to nonresident under the section from the judicial code, is removable as to all of them, though it is not contended that the controversy is "wholly" between citizens of different states. If this does not fly in the very teeth of this section it is hard to understand the section at all.

The court, in effect, here determined that though there is no separableness so far as jurisdiction is concerned there is such so far as alleged liability is concerned and apparently is dissatisfied with its ruling as it endeavors to bolster up the ruling with an inapplicable provision of law.

DUTIES AND RIGHTS OF NEUTRAL GOVERNMENTS.

Furnishing Aid to Belligerent.—According to international law, which is said to be the general rules which determine the conduct of civilized states in their dealings with one another, a neutral government is under the absolute obligation to do nothing which will aid one belligerent to the injury of the other. A neutral government has no right to furnish armed assistance in the way of troops or munitions of war to a nation engaged in war with another.[1] Some modern writers of prominence have said that a neutral state is at liberty to render aid of this nature in performance of a treaty made before the beginning of hostilities.[2] But a great deal of embarrassment was caused the United States Government in performing its part of the treaty of 1778 with France, wherein the United States accorded to the French certain privileges as to the use of United States ports by French war vessels and privateers, which privileges were not to be granted to the enemies of France; during the subsequent war between France and other European powers, the United States complied with the terms of the treaty and this action was made ground of complaint against the United States.[3] The general opinion now is, however, that such treaty provisions are no excuse for an obvious breach of neutrality and, in fact, modern nations no longer enter into treaties under which they would not be able to preserve strict neutrality in the event of war.

to some extent in the case of certain sales by the United States government of arms and ammunition not needed by it, which were begun before the Franco-Prussian war. Large purchases were made by an agent of the French government after the beginning of the war. The committee appointed by Congress to investigate these sales reported that if the purchasers were agents of the French, this fact was unknown to the United States government and even if it had been known, such sales would have been lawful, if made in pursuance of a national policy adopted prior to the war.[4] But European writers do not indorse the position taken by the committee as to such sales. Hall on Int. Law (4th ed.) par. 218, note.

Although the neutral nation has no right to furnish munitions of war to a belligerent, there is no obligation on it to restrain its subjects from doing so, and such subjects have the right to sell at home or carry to a belligerent nation arms and munitions of war, subject only to the possibility of their being seized as contraband of war while in transit. While Thomas Jefferson was secretary of state, he wrote to the British minister as follows:

"Our citizens have always been free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, munitions to a belligerent, but such subjects also have the right to loan money to one of the belligerents, and the neutral government is under no obligation to restrain her subjects from so doing. During the Franco-Prussian war, both nations borrowed money in England.[5] Daniel Webster stated in 1842 the correct position:

"As to advances and loans by individuals to the government of Texas or its citizens, the Mexican government hardly needs to be informed that there is nothing unlawful in this, so long as Texas is at peace with the United States, and that these are things which no government undertakes to restrain."[6]

But the neutral nation itself cannot loan money to one of the belligerents. This position was taken by the United States in its instructions to the commissioners sent to Paris to negotiate a treaty with France and this principle is also laid down in 1 Kent's Com., p. 116, as follows:

"The neutral is not to favour one of them (the belligerents) to the detriment of the other; and it is an essential character of neutrality to furnish no aids to one party, which the neutral is not equally ready to furnish to the other. A nation, which would be admitted to the privileges of neutrality, must perform the duties it enjoins. Even a loan of money to one of the belligerent parties is considered to be a violation of neutrality. A fraudulent neutrality is no neutrality."

Fitting Out Vessels.—At the time of the Civil War and subsequent thereto, there was an almost constant controversy between the United States and England as to the duties of a neutral nation in and by the award thereunder. The treaty contained certain rules as to the duties of a neutral nation, among which was one to the effect that a neutral nation is bound not to allow its territory to be used as a base of operations "by which is meant as a place from which a land or naval force draws resources or reenforcements, from which it sets forth on offensive expeditions, or in which it finds a place of refuge in time of need;"[7] also a rule declaring that "a neutral government is bound, first, to use due diligence to prevent the fitting out, arming or equipping within its juridiction, of any vessel which it has reasonable grounds to believe is intended to cruise or to carry on war against a power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use." Although these rules have been regarded with some disfavor by the powers generally, they no doubt express, in a general way, what is now considered the duty of a neutral government, and, in fact, at the commencement of the recent war between the United States and Spain, Great Britain recognized these rules by stating that the observance of them was a substantial part of the duty of a neutral power.

Rights of Neutral Nation, Commerce.—A neutral has a right to pursue its ordinary commerce and it may become the carrier of the enemy's goods, without being subject to any confiscation of the ship, or the neutral articles on board; though not without the risk of having the voyage interrupted by the seizure of ent ship for the purpose of obtaining necessary repairs of a nautical nature and sufficient supplies or provisions to enable her to reach her home port.[9] But it is now generally held that a neutral nation has no right to supply a belligerent ship with more coal than is sufficient to carry it to its nearest home port. This policy was first adopted by Great Britain during the Civil War in the United States, it being further provided that the same vessel should not obtain more than one supply of coal in British waters within three months.[10] And practically the same rule was also observed by the United States during the Franco-Prussian war.[11] While a belligerent vessel may enter a neutral port to obtain coal, nautical supplies and provisions as just stated, the vessel is generally forbidden to leave within twenty-four hours after the departure of a ship of the other belligerent, and neutral nations now generally restrict the stay of a belligerent vessel to a period of twenty-four hours, except in case of urgent necessity.[12] This restriction was imposed by Great Britain during the Civil War in the United States and likewise by the United States during the Franco-Prussian war.[13]

A belligerent may properly bring a prize into a neutral port, but the neutral has the right to refuse the same, and, in fact, the United States has frequently stated that it will not allow sales in its ports of prizes captured by foreign powers.[14]

Chancellor Kent says: "In the opinion of some jurists, it is more consistent with a state of neutrality, and the dictates of true policy, to refuse this favor, for it

ble, to gether with their prizes, in a neutral port."[15]

Contraband of War.—American and English jurists have always recognized that, apart from special convention or treaty, an enemy's goods on board a neutral ship are liable to seizure as contraband of war, while the goods of a neutral found on board an enemy's vessel are not liable to seizure. In other words, the rule as recognized is that war gives a belligerent the right to capture the goods of an enemy and not the goods of a friend. There was another theory expressed in the phrases, "free ships, free goods" and "enemy ships, enemy's goods," which theory was at one time the policy of France and Spain, apart from treaty. In 1856, Great Britain, France, Russia, Prussia, Sardinia and Turkey stated in the declaration of the Congress at Paris, to which they were parties, that (art. 2) "The neutral flag covers enemy's goods, with the exception of contraband of war" and (art. 3) "Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag." This declaration has since been accepted by all civilized nations, except Spain, Mexico, Venezuela and the United States, although the latter nation expressly adopted the principles of the declaration in the civil war and likewise in the war with Spain. Although the declaration of the Congress at Paris aforesaid provided that the same should not be binding "except between those powers who have acceded or who shall accede to it," yet it has been the policy of nations which were parties to it to give to neutrals not parties to it the benefit of its provisions, Having seen that under the general rules between nations the property of a neutral cannot be seized unless the same is "contraband of war," it is important to know just what articles and goods are included within the term. In the case of The Peterhoff,[16] the United States Supreme Court divided articles and goods into three classes: The first being those articles manufactured and primarily and ordinarily used for military purposes in time of war; the second being articles which may be and are used for purposes of war or peace according to circumstances; and the third, being those articles exclusively used for peaceful purposes. Merchandise of the first class, when destined to any port in a belligerent country or place occupied by the army or navy of a belligerent, is always held to be contraband; while the goods of the second class are contraband only when actually destined for the military or naval use of a belligerent, and merchandise of the third class is never contraband.

Arms and munitions of war are included in the first class and are universally treated as absolutely contraband, and, although the term "munitions of war" is rather indefinite, it is ordinarily held to include anything and everything primarily and ordinarily used for military purposes when in an enemy's possession in war times. In the case of The Bermuda,[17] it was held that articles for immediate use in battle, such as cannon, guns, pistols, swords, cartridges, gunpowder and shells were contraband. And in The Peterhoff,[18] artillery harness, army blucher shoes, artillery boots and "government regulation" gray blankets were likewise held to be contraband.

It is difficult to say just what articles above, since the practice of nations seems to be dictated generally by self-interest and since the treaties of the different nations with each other are very divergent in this respect, and, in fact, no individual nation seems to have pursued any consistent course in framing treaties in this regard. While provisions and articles of food and clothing are not generally contraband, under certain circumstances they may become such and will be so considered while in transit to the army or navy of an enemy or to the ports of military or naval equipment, unless, it would seem, they are the product of the neutral country to which the vessel belongs. In 1898, by General Orders No. 492, the United States took the position that provisions were contraband when destined for an enemy's ship or ships or for a place that is besieged. Likewise, provisions were held to be contraband in The Panama,[19] The Benito Estenger,[20] The Carlos F. Roses.[21] Materials for use in naval construction have been held to be contraband by the English courts and such is the rule at present in that country. Upon this theory, the following articles have been held to be contraband by the English courts: Planks and wood for shipping;[22] sail cloth,[23] masts and anchors;[24] copper for use as sheathing.[25] The United States also regards articles of naval construction as contraband, although such is not the rule in France.[26] Horses are held to belong to that disputable class of merchandise which may or may not be contraband, according to the circumstances. This is the rule in the United States,[27] although, as a general rule, horses are usually considered as

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(19) 176 U. S. 536.

(20) 176 U. S. 568.

(21) 177 U. S. 675.

(22) The Endraught. 1 C. Rob. 23.

contraband, regardless of circumstances.[28] Coal is considered to be contraband by England and is likewise regarded by the United States, although France and Russia have declared that it was not contraband.[29] General Orders, No. 492, issued by the United States to its navy, June 30, 1898, provided that coal should be considered contraband "when destined for a station, a port of call, or a ship or ships of the enemy."

THOMAS J. TYDINGS.

Moberly, Mo.

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(28) 1 Kent. Com. 136; Manning on Law of Nations, 355; Hall on Int. Law (4th ed.) par. 242.

(29) Hall on Int. Law (4th ed.) par. 244.

NEGLIGENCE—DANGEROUS CONDITION.

FURKOVITCH v. BINGHAM COAL & LUMBER CO.

Supreme Court of Utah. Aug. 14, 1914.

143 Pac. 121.

It is enough to show that while defendant's employe was shoveling a load of coal from a wagon on a roadway, on the side of a mountain, near the edge of a sharp incline, a piece of coal rolled down such incline, injuring plaintiff, negligence being inferable therefrom.

FRICK, J. This was an action in tort to recover damages for personal injuries. The plaintiff, respondent in this court, after alleging the necessary matters of inducement in his complaint, in substance, alleged, that on September 12, 1912, the defendant, appellant here, negligently and carelessly unloaded a wagon of coal on a "steep mountain side," and carelessly and negligently failed and omitted to place any safeguards or barriers to prevent said coal from "rolling down said steep mountain side," and carelessly and negligently omitted taking any other precautions to keep said coal from rolling down said mountain side; that in unloading said coal it was so carelessly and negligently done that a piece thereof "rolled and bounded down said mountain side," struck the plaintiff, who lived down the mountain side and in the vicinity where the coal was being unloaded, severely injuring him. The appellant in its answer admitted "that it was engaged in unloading coal at the time and place stated in the complaint, and that the plaintiff lived in the vicinity where said coal was being unloaded." It was also admitted in the answer "that the hillside below where said coal was unloaded is steep, but (appellant) alleges that the place where said coal was unloaded is a flat place, due to a widening of the grade of the wagon road at said point, and the unloading of coal at said point in the way it was being done was not obviously or inherently dangerous." It was further admitted that said coal was "unloaded by shoveling the same out of the wagon in which it was contained" onto the ground. Appellant denied all acts of negligence, and pleaded contributory negligence on the part of respondent. Upon these issues a trial to a jury resulted in a verdict and judgment in favor of respondent. The appellant has preserved all the evidence adduced at the trial in a proper bill of exceptions, and, among other things, now insists that the evidence is not sufficient to sustain the verdict and judgment.

The evidence produced on behalf of respondent at the trial is, substantially, as follows: That on September 12, 1912, respondent lived with his wife in a small house in what is called a gulch in Bingham Canyon, about 200 feet distant and down a steep incline from the point where the load of coal mentioned in the pleadings was being unloaded by one Davis, an employe of the appellant; that the coal was being unloaded at a place where appellant and others had frequently before unloaded coal for the use of those who lived in the gulch aforesaid, of whom there were quite a number of families who lived there in small houses; that the coal and other things were unloaded at the place aforesaid, for the reason that there was no way to reach the small houses by team and wagon, and hence said coal and other things were usually unloaded, that is delivered, on top of the mountain as aforesaid, and those who purchased coal would get it there and take it down the mountain to their homes. On September 12, 1912, the exact time of day is not disclosed, the respondent and one Sabine were digging a small cellar in the rear of respondent's house. When they were about through, and just after Sabine had left the cellar, he noticed a large piece of coal rolling down the steep incline of the mountain, which incline was shown to be from 36 to 40 degrees. The coal was coming fast in the direction of respondent, and Sabine shouted to him to get out of the way. Respondent dodged to get out of the way of the lump of coal, but it struck him, grazing his head and striking him on the arm, breaking it. Respondent became unconscious from the blow, and was immediately taken into the house by his wife and Sabine. Sabine and respondent's wife immediately (within five minutes they state) went up the trail to the top of the mountain where the coal was being unloaded and they found Davis in the wagon, in which there was some coal left. There was what they called a "big pile" unloaded on the ground. Respondent's wife testified that the edge of the pile of coal was about two feet from the margin of the highway or flat place where the coal was being unloaded, that is about two feet from the brink of the steep incline of the mountain. Both Sabine and respondent's wife testified that there was no barrier or protection of any kind placed around the edge of the road where the coal was thrown from the wagon to prevent any pieces from rolling down the mountain side towards the houses in which the people were living in the gulch below. The lump of coal which rolled down the mountain side was produced in court and exhibited to the jury, but its size or shape is not disclosed. The only other evidence produced by the respondent related to the character and extent of the injuries and the damages sustained by him. When respondent rested appellant interposed a motion for a nonsuit upon the ground, among others, that respondent had failed to establish negligence on its part. The motion was overruled, after which appellant produced some evidence to the effect that the flat place where the coal was unloaded was larger in extent or area than testified to by respondent's witnesses, and that the coal was further away from the edge or margin of the mountain brink. No explanation was offered respecting the unloading of the coal or how it happened that the piece in question passed beyond the margin of the highway and rolled down the mountain side.

(1) Appellant contends that the court erred in overruling its motion for nonsuit. In considering that question it must be remembered that appellant admitted the unloading of the coal in question. While the admission is not couched in that particular form, yet the admission is that it unloaded coal "at the time and place" stated in the complaint, and the evidence is clear that no one else unloaded or handled coal at the time and place mentioned; hence the admission is to the effect that appellant unloaded the coal in question. It is admitted, therefore, that appellant unloaded the coal by shoveling it from the wagon onto the ground near the margin of the steep mountain side, and at a place in the vicinity of which there lived a number of families in small houses, which were some 200 feet down the mountain side, and the evidence is not disputed that the incline or slope of the mountain at that point was from 36 to 40 degrees. If, therefore, any object, such as a stone or a piece of coal of any considerable size, the shape or form of which was round, or nearly so, were thrown to or near the margin, or where it would bound and land so near the margin of the highway on the mountain that by reason of its high specific gravity the force of gravitation would cause it to roll down the incline of the mountain, it in all probability would become a source of danger to any one who might be in its pathway. Every sane person is charged with knowledge respecting the properties of matter and the natural laws of nature. Every person who is handling objects which are affected by the law or force of gravity is charged with the knowledge that if he permits such objects to fall or to be where the force of gravity will cause them to move downward, any one who may be in the pathway of such an object, while in motion, may be injured. If, therefore, a person, where he has a right to be, is injured by such a moving object, he is not required to prove any particular act of negligence on the part of the person in whose care and under whose control the object in question was before the injury occurred, but, under such circumstances, it is sufficient that the injured person prove the facts from which negligence may be inferred. In the case at bar the respondent proved that appellant was handling a substance of high specific gravity; that it was thrown from a wagon onto the ground near the margin of a steep incline, and where if it moved or rolled beyond the margin, the immutable laws of nature would cause it to continue to roll down the mountain side, and thus might, and probably would, inflict injury upon any living being in its pathway. Then again, all men, the jury included, are bound to know that it is a universal and unchangeable law of nature that if any substance of any considerable size and specific gravity is placed at rest it will so continue until it is started in motion by some physical force or power. The inference, therefore, that Davis, who was unloading the coal, caused the piece in question to be precipitated over the edge of the margin of the mountain is not only natural and logical, but it is one of great probative force. The jury, therefore, were not only justified in inferring or presuming that Davis, in unloading the coal placed it where by the forces of nature it would roll down the mountain side, but it seems to the writer they could not well have arrived at any other logical conclusion. Being charged with knowledge that if so placed the coal would, nay, must, roll down the moun-

tain side to a place where people were living, the jury had a right to infer that it was through the negligence of Davis that it was so placed. Where a person is working on a building, wall, or scaffold which extends any considerable height above the surface, and has in his possession and under his control tools, or other objects, which he permits to fall from the building, wall, or scaffold, by reason of which injury is inflicted on another, negligence may be inferred or presumed from the mere fact of the falling of the objects aforesaid. See Sheridan v. Foley, 58 N. J. Law, 230, 33 Atl. 484; Armbright v. Zion, 108 Iowa, 338, 79 N. W. 72; Melvin v. Pennsylvania Steel Co., 180 Mass. 196, 62 N. E. 379. See, also, note to Barnowski v. Helson, 15 L. R. A. 33, where a large number of cases are collated. There is no difference in principle between objects handled on a building, wall, or scaffold and those that are thrown or placed near a precipitous or steep incline. Whatever difference there is in that regard is one of degree and not of kind. The foregoing cases, therefore, are strictly in point here.

[2] In this case there is, however, another fact or circumstance which the jury were authorized to consider in determining whether appellant was negligent or not in the premises. The fact is uncontroverted that no effort whatever was made to prevent any stray piece of coal that might bound away from the other coal, or in some other way get near the brink of the steep incline, from going beyond it and down the mountain side. That some barrier or protection could have been placed along the edge of the road to prevent pieces of coal from going down the mountain side, and that such could have been done without practically any effort or expense, is so palpable that merely to mention the fact is sufficient. Where a dangerous condition is easily obviated or rendered harmless, a failure to do one or the other may be considered in determining the question of negligence. See Swan v. Railroad, 41 Utah, 518, 127 Pac. 267, where the principle is applied, and where the cases on the point are referred to. We are clearly of the opinion that the evidence was sufficient to justify a finding of negligence upon the part of appellant, and that under the circumstances the duty was cast upon it to offer some explanation of how the

"You are instructed that if you should find from a preponderance of the evidence that the piece of coal which rolled down the mountain side and struck the plaintiff was a part of the coal being unloaded by the defendant at the time and place alleged in plaintiff's complaint, the rolling of such piece of coal down the steep mountain side raises a presumption of negligence on the part of the defendant, and unless you should find from all the evidence in the case that such presumption is overcome, you should find for the plaintiff."

Appellant excepted to the foregoing instructions and now insists that the court erred in so charging the jury. If what we have said respecting the inference or presumption of negligence is correct, then it follows that the court did not err in giving the charge excepted to. What we have already said, therefore, respecting the principle involved in the charge disposes of this contention.

It is also insisted that the court erred in refusing a number of requests to charge offered by appellant. It offered 13 requests, all of which the court refused. We have carefully examined all of them, and each one contains some fault. In view of the great length of the requests just referred to we shall not set the mforth here; nor would it serve any useful purpose to do so. It must suffice to say that because of the inherent defects contained in each request the court was fully justified in refusing to give any of them.

NOTE.—*Res Ipsa Loquitur as Meaning the Mere Fact or With Attendant Circumstances.*—The instant case seems well ruled and the principle upon which it proceeds seems well illustrated in the case of Northern Pac. R. Co. v. Le Dean, 19 Idaho, 711, 115 Pac. 502, 34 L. R. A. (N. S.) 725, where there was a finding of non-liability.

That case concerned the rolling of a stone down a precipitous rocky mountain side and through the window of a passing train, striking and injuring plaintiff, a passenger.

The court said: "It is clear that the rock did not fall from the side of the cut. It was evidently not an overhanging or loose rock left on the face of the cut through which the track was laid. The respondent seems to think that the rock came from high up on the mountain side, and that theory is borne out by the testimony of the other witnesses, as well as by the surrounding circumstances, and the actual falling of the stone and its striking the car at the falling on trains. At the same time it was bound to protect passengers from obvious dangers. "But what might be termed an apparent and obvious danger along a railroad track in some sections of the United States, especially in less mountainous and rugged sections, would clearly not be considered an obvious danger along a line of road through the mountains, canyons and gorges of this country, and particularly of Northern Idaho." The theory of all this recognizes the laws of nature may impose in regard to an obvious danger to be protected against, but protection may be lessened in some circumstances and strictly required in others.

Even in a master and servant case where, strictly speaking, it is said *res ipsa loquitur* does not apply, it was held as to a butt-mold, which was left standing up instead of being laid down, that a servant could recover, because there was an obvious danger in the mold being placed in a position where a jar would start it rolling. Joliet Steel Co., 146 Ill. 603, 34 N. E. 1108.

Where sawdust on an overhead structure belonging to a street railway was blown into the eyes of a passenger, it was held this did not afford just ground for a reasonable inference that according to ordinary experience the accident would not have occurred except for want of due care." Wadsworth v. Boston Elevated Ry., 182 Mass. 572, 66 N. E. 421.

Britton v. St. Louis Transfer Co., 155 Ill. App. 317, applied the principle decided by the instant case to a person being injured by merchandise falling from a passing wagon of defendant, it being shown that the wagon was piled with loose furniture above the stakes.

A very interesting statement is made by Judge Nortoni of St. Louis Court of Appeals, recognizing, so to speak, an extension of the rule *res ipsa loquitur,* as follows: "There is, we understand, a marked distinction between the presumption afforded by the law in the doctrine *res ipsa loquitur* and a legitimate inference of negligence that may be gathered by the jury from the facts and circumstances in proof which surround and touch upon the alleged breach of duty. Where negligence thus appears as a reasonable inference from the facts and circumstances before the jury, it may be found therefrom to exist wholly aside from the presumption above mentioned. In such cases, the facts and circumstances affording reasonable inferences to the effect that defendants breached their duty are sufficient to cast the onus of exculpation from fault upon the adverse party and make a prima facie case." Copehart v. Musta, Mo. App. 145 S. W. 827.

This was said as to a hayfork falling upon plaintiff's husband, while unloading a load of hay. It was argued it fell from the trip rope giving way at a particular point.

We said above this was like an extension of the doctrine *res ipsa loquitur* as literally translated, while our view takes in the complete fact and the other but one phase of the circumstances. At all events both make a *prima facie* servant cases of mere fact of injury not applying, but accompanying circumstances to show antecedent fault must be produced is recognized.

And in Byers v. Carnegie Steel Co., 159 Fed. 347, 86 C. C. A., 347, 16 L. R. A. (N. S.) 214, this rule is enforced by requirement of a showing of an accident and the circumstances under which it occurred.

Still more pointed, however, for our purpose here is the case of Westland v Gold Coin Mines Co., 101 Fed. 59, 41 C. C. A., 193, where Judge Thayer said: "The fact that the stoll fell demonstrates that it was insufficient to support the load with which it was burdened at the time it fell. The case in hand, then, is not that kind of which it may be said that the occurrence of the accident affords no evidence of negligence." The piling of the stone that rolled down the hill in the instant case was no otherwise an act of negligence than the insufficient supporting of the stoll, or *vice versa.*

In Hemphill v. Buck Creek Lumber Co., 141 N. C. 487, 54 S. E., the allowing rotten crossties to remain as the support of rails, joined to the fact of their spreading, made a *prima facie* case against the defendant.

And so in Sackewitz v. American Biscuit & Mfg. Co., 78 Mo. App. 144, a falling piece of timber, along with given circumstances made a *prima facie* case.

The rule as expressed by Judge Nortoni, *supra* is a little differed from, in definition, by New York Court of Appeals which says: "The phrase *res ipsa loquitur,* literally translated, means that the thing or affair speaks for itself. It is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify the conclusion that the accident was caused by negligence. The inference of negligence is deducible, not from the mere happening of the accident, but from the attendant circumstances." Marceau v. Ruthland R. R. Co., 211 N. Y. 203, 105 N. E. 206. In this case the court looked back of the immediate occurrence producing the injury to the probable cause of the trouble. As showing how aptly the case applies to the instant case we quote as follows: "There can be no doubt that the explosion by which the plaintiff was injured was due immediately to the displacement of the flue. It is a matter of common knowledge that steam, like electricity, is a capricious and fickle agency, which sometimes causes unexpected and unexplainable accidents."

C.

CORRESPONDENCE.

APPELLATE COURT ENTERING FINAL JUDGMENT.

"The Stopping Point in Litigation," I came across this statement, on page 338, in second column: "We are convinced that the jury trial system must require modification to continue in America. England has abolished, etc. * * * Having done so, she has then empowered her appellate courts to render final judgment on appeal, by correcting the errors of the courts below—a thing which is yet impossible in any American state in jury cases."

That the writer of the article is very much in error, I respectfully call his attention to the case of Maddux v. St. Louis Union Trust Co., decided at this (October, 1914) term of the St. Louis Court of Appeals—but as yet unreported—where a verdict of a jury in favor of defendant was by the Court of Appeals reversed and remanded, with directions to enter judgment for plaintiff; also to section 2083 of the Rev. Stats. of 1909, of the State of Missouri, and to the following cases: Joy v. Call, 124 Mo. App. 569; Betzfelder v. Waddle, 122 Mo. App. 462; In re Hutton's Estate, 92 Mo. App. 132; Patterson v. Patterson, 200 Mo. 335; Donnell v. Wright, 199 Mo. 304.

I find that the fault is not with the jury, but with the courts.

Respectfully yours,
HENRY B. DAVIS.

St. Louis, Mo.

NOTE.—Our correspondent in disputing the statement in the article referred to cites a number of cases which we have examined. Of those reported, one was a reversal and remand for new trial, one an affirmance on conflicting evidence, the third was like the first, the fourth was an equity case, which has always stood very differently from a law case—appellate courts making their own findings of fact, and the fifth was merely a construction of a statute, in which it was held that a reversal, on defendant's appeal, without more, amounted to a non-suit.

The Maddax case merely held that plaintiff's *prima facie* case was not disputed by any competent evidence to the contrary. None of these cases seems to us, therefore, in point.

The difficulty in American courts to which our contributor refers is in the constitutional right of trial by jury. An exception, however, is to be noted in Louisiana practice.

This question resembles greatly the partial new trial theory as to which this Journal has had considerable to say. We refer to an annotation by the present editor on this subject in 68 Cent. L. J. 161, where many authorities are cited and discussed, among others two Missouri cases. It is rare that this state has exercised the power as in those cases, but if it has it, we can conceive of no duty that would go further in support of the precept that justice delayed is justice denied.—EDITOR.

BOOK REVIEWS.

DIGEST OF WORKMEN'S COMPENSATION AND INSURANCE LAWS IN THE UNITED STATES,—REVISED TO DECEMBER, 1914.

To all who are interested in workmen's compensation and its progress throughout the United States, the Workmen's Compensation Publicity Bureau (F. Robertson Jones, secretary-treasurer, 80 Maiden Lane, New York City) has rendered a valuable service in compiling for ready reference and comparison an analysis of all the laws on this subject now in force within the United States. The Digest of Workmen's Compensation and Insurance Laws in the United States enters upon the second year of its publication revised to December, 1914, and now covers the laws of this character in 24 states including the Nebraska Act which was ratified by popular vote on November 3 last.

These various enactments, while differing widely in their administrative details and as to the amount and method of compensation provided, are all designed to meet the same end and therefore have many features in common. In this Digest the law of each state is analyzed under 35 headings which cover the essential features of the entire range of compensation laws in this country. The Digest is bound in convenient pocket form, and the arrangement is so devised as to present at once a comprehensive summary of the law in each state and a ready comparison of the provisions in the respective states as to any one or more particular items.

A new feature of the Digest which greatly enhances its value as a work of reference is a collection of cases cited at appropriate points throughout the Digest. The subject of compensation opens up a new and extensive field of adjudication in the United States, and the cases here assembled afford a judicial determination of many disputed points which have already arisen.

The Digest likewise gives the names, with postoffice addresses, of members of Workmen's Compensation Commissions, Industrial Accident Boards, or other officials having power to supervise or enforce the operation of the laws. It also contains a map showing graphically those states in which there are compensation laws, those states in which there are no laws, and those states in which there are no laws, but in which there are, nevertheless, official commissions investigating the subject preparatory to introducing bills at the next sessions of their State Legislatures.

This Digest has come to be recognized as an authority on compensation laws, and already enjoys a wide circulation among industrial accident boards, workmen's compensation commissions, state labor bureaus, legislators, lawyers, jurists, publicists, social workers, employers, casualty insurance managers and liability insurance agents and brokers. The work is compiled and copyrighted by F. Robertson Jones and offered for sale by the Workmen's Compensation Publicity Bureau at $2.00 bound in paper, or $3.00 in flexible leatherette binding.

BOUVIER'S LAW DICTIONARY.

There comes to our desk the eighth edition, which constitutes the third revision, of possibly the best known book in the literature of American law. The first edition was in 1839 and in the course of more than fifty years seven editions, containing two revisions, came down to 1897. Now in 1914 the third revision occurs.

The editor of this revision is Mr. Francis Rowle, of Philadelphia, and it comes in three volumes, extension being made because of so much in new nomenclature occurring and annotation being greatly extended, and the series of reports now extant being added.

This third revision, however, pays no very great regard to titles of a statutory and changing nature, the work preserving its characteristic of permanence in the legal world.

An interesting example of the advance made by this edition of one of the elder books in the law meeting the new conditions is found in the definitions of the word "Alimony," and to what it applies. Treatment of this word takes up four pages, wherein is cited a great abundance of authority,—a veritable treatise on the subject.

This is but an example, and other titles are treated as exhaustively, making of the work not only a thesaurus of definition but, in effect, an authority for the practitioner in his search, for principles governing cases or questions.

These volumes are presented in the best style of the printer's art, both for readableness and endurance, in their binding of law buckram and issues from the houses of Vernon Law Book Company, Kansas City, Mo., and West Publishing Company, St. Paul, Minn., 1914.

HUMOR OF THE LAW.

"And are the divorce laws very liberal in your section?"

"Liberal? Say! They are so liberal that nobody ever heard of a woman crying at a wedding out there."—Detroit Journal.

Visitor—I've seen that man standing against that store for the past hour. Who is he—the constable?

Native—Naw; he be the banker, an' he's got a lien agin that property.—Michigan Gargoyle.

The judge decided that certain evidence was inadmissible.

Counsel took strong exception to the ruling, and insisted that it was admissible.

"I know, your honor," he said, warmly, "that it is proper evidence. Here I have been practicing at the bar for forty years, and now I want to know if I am supposed to be a fool?"

"That," quietly replied the judge, "is a question of fact, and not of law, so I won't pass any opinion upon it, but will let the jury decide."

In the British Parliament the question was once raised as to the need of having in the Wales county court judges who could speak the Welsh language.

The English members contended that there was not the slightest necessity for it; an English-speaking judge would, in every case, do exactly as well as a native. Then Mr. Mabon, a Welsh member, sprang to his feet.

"Very well," said he, "let us consider the matter. Here we are in the county court house at Ynysymaengwyn. I am the plaintiff. The attorney-general is the county court judge. He, in the course of the case asks me if I am prepared to swear that the boots delivered to the defendant, for the price of which I sue, were rights and lefts, or otherwise as the defendant alleges.

"That is a delicate question which I, with my partial knowledge of English, do not trust myself to answer, except in my native tongue. Therefore I say:

"'Cywmer daubwoch, ar gwastad clawdd lluest twich; pen-dre pistyll bwich dwy hafodtai lech wedd Yspytty?'

"Now," he thundered, while the House held its breath, and a cloud of embarrassment stole over the face of the attorney-general, "what does the honorable and learned gentleman say to that?"

The honorable and learned gentleman had no further objection to make.—Green Bag.

WEEKLY DIGEST.

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Account**—Equity.—Equity held to have jurisdiction of an accounting where the amount due could be ascertained only by investigating books and papers in defendant's possession, and the accounts which were so complicated that jurors could not satisfactorily determine the amount due.—Ely v. King-Richardson Co., Ill., 10 N. E. 619.

2. **Adverse Possession**—Presumption.—Where one enters by permission into possession of land, the presumption is that the subsequent possession and that of those claiming under him is in subordination to the paramount title: but such presumption may be overcome by evidence that it is adverse, of which fact the paramount possessor had actual notice or imputed knowledge.—Gee v. Hatley, Ark., 170 S. W. 72.

3. **Attorney and Client**—Deposit in Bank.—A bank which has credited a depositor's account with the amount of a check, drawn on another bank and deposited by him, before the check has been presented to the other bank for payment, is a general debtor to the depositor for that amount, and not a trustee to collect, where the bank becomes insolvent before the check is paid.—Gonyer v. Williams, Cal., 143 Pac. 736.

4.——Lien.—Counsel who, during the illness of the attorney of record, prepared the case for argument on appeal, though entitled to compensation therefor outside of his contract with the attorney of record, had no general lien, the right to which is limited to the attorney of record.—Goodwin Film & Camera Co. v. Eastman Kodak Co., U. S. D. C., 216 Fed. 831.

5.——Presumption.—That an attorney appears on behalf of a party raises a presumption of authority, but the presumption is disputable, and where it is fairly shown that no authority existed, the party can found no rights on the attorney's unauthorized act.—Title Ins. & Trust Co. v. California Development Co., Cal., 143 Pac. 723.

6. **Bail**—Refusal of—Where, on an application for bail, there is positive unimpeached evidence to sustain the conviction, and the entire evidence shows more than a mere probability of guilt of a capital offense, bail may be refused under Declaration of Rights, § 9, though the state's evidence be contradicted and conviction of a lesser crime would have been authorized.—Ex parte Tully, Fla., 66 So. 296.

7. **Bailment**—Defined.—A "bailment" is the holding of a chattel by one person under an obligation to return it to another after some special purpose is accomplished.—Gilson v. Pennsylvania R. Co., N. J., 92 Atl. 59.

8. **Carriers of Live Stock**—Contributory Negligence.—A provision in a contract for the carriage of a shipment of live stock that plaintiff would "be required" to ride in the caboose held not to make it negligence for him to ride in a car with the stock, with the knowledge of the trainmen and without objection from them.—Ralph v. Chicago & N. W. Ry. Co., U. S. C. C. A., 216 Fed. 744.

9.——Insurer.—A carrier, not being an insurer of a shipment of live stock against increased risks necessary to the transportation, is not liable for injuries, unless negligent.—Ft. Worth & D. C. Ry. Co. v. Berry, Tex., 170 S. W. 125.

10. **Carriers of Passengers**—Baggage.—Winter clothing which a passenger expected to use on the completion of his journey, winter being near, is baggage for the loss of which the carrier is liable.—San Antonio & A. P. Ry. Co. v. Green, Tex., 170 S. W. 110.

11——Loss of Ticket.—A sleeping car conductor is not required to accept the uncorroborated statement of a passenger that he had lost his ticket, and the company is not liable for the refusal of accommodations to the passenger, if such refusal was reasonable.—Armstrong v. Pullman Co., Miss., 66 So. 283.

12. **Chattel Mortgages**—Public Policy.—The lending of money upon chattel mortgages, and the carrying on of an habitual business on such security, is not contrary to public policy, and is not subject to regulation as in the case of pawnbrokers.—Wood v. Krepps, Cal., 143 Pac. 691.

13. **Commerce**—Foreign Corporation.—That a foreign corporation sends its agents into the state to solicit orders does not cause sales made by such corporation, where consummated outside of the state, to lose their standing as interestate commerce.—American Mfg. Co. v. Skidmore Drug & Furniture Co., Tex., 170 S. W. 128.

14.——Penalty.—The Interstate Commerce Commission under Interstate Commerce Act § 15, subd. 5, having ruled that a shipper may direct as to terminal routing and delivery, but having provided no penalty for a violation thereof no recovery can be had under the state law. Civ Code 1912, §§ 3194, 3195.—Mitchell v. Greenville, S. & A. Ry. Co., S. C., 83 S. E. 261.

15.——Sales by Solicitors.—Sales of goods by means of orders taken by solicitors, the goods remaining in all instances, the property of complainant, a New Jersey corporation, until they were delivered to the customer in Oregon, held interstate commerce, and hence neither complainant nor its solicitors were subject to the Oregon Peddlers Law.—Grand Union Tea Co. v. Evans, U. S. D. C., 216 Fed. 791.

16. **Common Carriers**—Warehouseman.—The common-law rule relieving a carrier, as such, from liability upon placing cars where they can be conveniently unloaded by the consignee merely changes its liability to that of a warehouseman.—Gary Bros. & Gaffke Co., v. Chicago, M. & P. S. Ry. Co., Mont., 143 Pac. 955.

17. **Constitutional Law**—Abutting Owners.—Laws 1895, c. 1006, providing that, where an official map is filed showing a discontinuance of certain streets, the rights of abutting owners to compensation for easements so appropriated shall be lost after six years, held unconstitutional, as depriving such owners of their property without due process of law.—In re Grand Boulevard and Concourse in City of New York, N. Y., 106 N. E. 631.

18.——Discrimination.—Acts 1913, c. 6422, relative to perfecting the right of investment companies to do business in the state, held not to arbitrarily discriminate against a local corporation so as to deny to it the equal protection of the law.—Ex parte Taylor, Fla., 66 So. 292.

19.——Imprisonment for Debt.—Acts 1913 (1st Ex. Sess.) c. 29, declaring it a misdemeanor if a corporation does not pay its employes at stated periods, indirectly authorizes imprisonment for debt, in violation of Const. 1870, art. 1, § 18.—State v. Prudential Coal Co., Tenn., 170 S. W. 56.

20. **Contracts**—Alterations. — Where the plans of an architect deviated so slightly from the law that an alteration could have been easily made, and the architect was given no opportunity to alter them, he is entitled to recov-

er for his services.—Klemm v. Hermann, N. J., 92 Atl. 51.

21. Corporations.—Corporation de Facto.—If some reqirement to a valid organization of a corporation is omitted, such as a failure to file its articles with the proper officer, and the other requirements are met, there will be a "corporation de facto."—Bank of Midland v. Harris, Ark., 170 S. W. 67.

22.——Employment Contracts.—Where the principal creditor of a corporation acquiesced in allowing a "general manager" to remain in charge until after sale on foreclosure of the creditor's mortgage, both the owner and the creditor were bound by employment contracts made by such manager, to the extent that the employes who acted in good faith were entitled to the privileges allowed by law for salaries and wages.—People's Bank & Trust Co. v. Fenwick Sanitarium, Ltd., La., 66 So. 307.

23.——Evidence.—In a suit for services, where plaintiff sought to recover on the theory that the contract made by the president alone was binding upon the corporation. he owning all the stock, evidence that the books of the corporation showed no authority of the president to enter into the contract is immaterial.—Edwards v. Plains Light & Water Co., Mont., 143 Pac. 962.

24.——Receivership.—Where the assets of a corporation have been sold in receivership proceedings, the right of a stockholder to hold the complainant, the receiver, and the other directors liable personally for losses incurred by such stockholder, by reason of such sale can be enforced by a separate bill, and not in the receivership proceedings. — Hutchinson v. Philadelphia & G. S. S. Co., U. S. D. C., 216 Fed. 795.

25. **Courts**—Rule of Property.—A former decision of the Supreme Court, which establishes a rule of property to which contracts can easily conform, will not be overruled, even if manifestly wrong, if it is not mischievous.—Forest Product & Mfg. Co. v. Buckley, Miss., 66 So. 279.

26. **Criminal Law**—Circumstantial Evidence.—Accused while under arrest having voluntarily placed one of his shoes in a track near the scene of the homicide, evidence as to the measurement of the shoes and tracks from a comparison made while accused was under arrest was not objectionable.—Underwood v. State, Miss., 66 So. 285.

27.——Directing Verdict.—Even where imprisonment is not a part of the punishment, the court may direct a verdict of guilty, where the evidence is consistent only with guilt, and the witnesses stand unimpeached either on account of bias or prejudice.—Paxton v. State, Ark., 170 S. W. 80.

28. **Customs and Usages**—Remittance by Bank.—Where a draft was remitted to a bank for collection, the contract for the collection and for the disposition of the proceeds thereof was one resting in general usage, and such usage was therefore admissible to explain the contract, under Code Civ. Proc. § 1870, subd. 12.—Gonyer v. Williams, Cal., 143 Pac. 736.

29. **Damages**—Wife's Earnings.—In a personal injury action by a married woman, where there was no showing as to her ability to earn money or her expectancy of life, it was improper to submit to the jury the item of damages for her loss of time.—City of Boulder v. Stewardson, Colo., 143 Pac. 820.

30. **Death**—Eyewitnesses.—In an action for the wrongful death of a miner, where there were no eyewitnesses, the presumption that he exercised due care in his own behalf, announced by Code Civ. Proc. § 1963, subd. 4, while rebuttable, is conclusive under section 1961 when not controverted.—Crabbe v. Mammoth Channel Gold Mining Co., Cal., 143 Pac. 714.

31. **Deeds**—Condition Subsequent.—Where a deed upon condition subsequent that the grantee build and operate a sawmill was duly recorded, and the condition broken before action was begun against the grantee, the grantor, on reentering, became the owner of machinery attached.—Bay City Land Co. v. Craig, Ore., 143 Pac. 911.

32.——Grantees.—Where a deed conveyed property to the grantors' daughter, "her children, the heirs of her body," the terms "her children" and "the heirs of her body" were used synonymously to mean "children" in a descriptive sense and hence the daughter took a life estate.—Duncan v. Medley, Ky., 170 S. W. 31.

33.——Joint Alienation.—The provision in a deed, that neither of the grantees shall sell his or her interest while the other is living, even if valid, does not prevent a joint alienation by them.—Holloway v. Green, N. C., 83 S. E. 243.

34.——Voluntary Deed.—No disaffirmance is necessary to set aside a voluntary deed, where the grantee himself took the hand of the grantor, while she was insensible, and himself made her mark on the paper.—Barkley v. Barkley, Ind., 106 N. E. 609.

35. **Divorce** — Instruction. — An instruction that if plaintiff sought a divorce because of the influence of her mother, instead of the wrongs of defendant, to find for defendant is erroneous as authorizing a verdict solely on the issue whether the mother induced the suit.—Powell v. Powell, Tex., 170 S. W. 111.

36.——Residence.—The word "residence," as used in P. S. 3071, requiring a year's residence as a condition to a suit for divorce, means legal domicile and where libelant's husband lived in Vermont and compelled her to go to another state, she was still a resident of Vermont, entitled to sue for divorce there, though she actually resided for a year before suit in such other state.—Miller v. Miller, Vt., 92 Atl. 9.

37. **Easements**—Lessee.—Where the lessee of a coal mine was granted a right of way to lay a water pipe line without the right of way being definitely described. and the way as located by him proved impracticable, because it was necessary to abandon the old operations and locate a new mine, he had a right to locate a new right of way for the pipe line.—Mary Helen Coal Co. v. Hatfield, W. Va., 83 S. E. 292.

38. **Electricity**—**Fixtures**.—An electric company upon changing the kind of current furnished its consumers, held not bound to alter fixtures so that they would be suitable for the new current.—Hunt v. Marianna Electric Co., Ark., 170 S. W. 96.

39. **Equity**—Discharge of Servant.—The maxim that he who comes into equity must do equity, held not to deprive sales managers, discharged for misconduct, of their right to an accounting not founded in any way on their wrongful conduct.—Ely v. King-Richardson Co., Ill., 106 N. E. 619.

40. **Estates**—Defined.—An "estate" in land is the right to the possession and enjoyment of it, while a "lien" on land is the right to have it sold or otherwise applied in satisfaction of a debt.—State Bank of Decatur v. Sanders, Ark., 170 S. W. 86.

41. **Estoppel**—Innocent Purchaser.—An innocent buyer of coal from an agent who represented that he was selling it on his own account cannot avoid liability to the true owner for the portion of the purchase price which he set off against a debt owed him by the agent before the sale, or for unpaid part of the purchase price.—Rocky Mountain Fuel Co. v. Geo. N. Sparling Coal Co., Colo., 143 Pac. 815.

42. **Evidence**—Admissions.—A mere offer to pay in compromise on a condition not accepted an item claimed to be owed is not an admission of such item being owed.—Tabet Bros. Co. v. Higginbotham, Tex., 170 S. W. 118.

43.——Foreign Marriage.—On an issue as to the performance of a marriage ceremony by a justice of the peace in a foreign state, the burden was on plaintiff to prove that the justice, under the laws of the state, was authorized to perform marriages.—Frederick v. Morse, Vt., 92 Atl. 16.

44. **Exchange of Property**—Rescission.—The promise of defendants to stand by plaintiff in the rooming house business transferred to her cannot be made the basis for rescission of an exchange.—Haney v. Parkison, Ore., 143 Pac. 926.

45. **Execution**—Vendible Property.—A vendor's lien, being a mere security for the payment of the debt due the vendor, was not vendible under an execution on a judgment against the vendor—State Bank of Decatur v. Sanders, Ark., 170 S. W. 86.

46. **Executors and Administrators**—Trustee.—Where an administrator c. t. a. obtains a fund

on the erroneous theory that he is also testamentary trustee, and afterwards defaults with reference thereto, a surety on his bond as administrator is not liable therefor.—In re Quimby's Estate, N. J., 92 Atl. 56.

47. **Fixtures**—Personal Property.—On breach of a condition subsequent, an engine and dynamo which had been used in a sawmill, on being borrowed and not returned, or returned and not used, became personal property subject to execution for the debts of the grantee.—Bay City Land Co. v. Craig, Ore., 143 Pac. 911.

48. **Fraud**—Executory Contract.—When a purchaser under an executory contract, who has paid only part of the purchase price, discovers that the land was misrepresented and elects to affirm the contract, in an action for damages the amount yet due under the contract should be deducted from the damages sustained.—Hines v. Brode, Cal., 143 Pac. 729.

49. **Frauds, Statute of**—Boundary Line.—The apparent transfer of lands, where a boundary line agreed upon by the parties varies from the true line, does not violate the statute of frauds, since it merely serves to establish the location upon the ground of the line described. —Grants Pass Land & Water Co. v. Brown, Cal., 143 Pac. 754.

50. **Garnishment**—Certified Check.—Where a garnishee bank accepted a certified check in payment of a note it held for collection, it was liable as garnishee for the amount of the collection, less the customer's debt to it.—Midway Five Oil Co. v. Citizens' Nat. Bank of Los Angeles, Cal., 143 Pac. 800.

51. **Gas**—Rates.—A city ordinance, fixing gas rates and prohibiting the collection, by rebate, drawback, or other device, of a greater or less or different sum than the rates fixed, prohibits a gas company from granting a discount to consumers paying their bills at its office on or before a designated day of the month next succeeding that during which the indebtedness was incurred.—Economic Gas Co. v. City of Los Angeles, Cal., 143 Pac. 717.

52. **Gifts**—Love Letters.—A love letter written by a man to a woman to whom he had proposed marriage, in which he stated that certain rugs were at her disposal, held not to constitute a valid gift to her, under Civ. Code, § 1147.—Humble v. Gay, Cal., 143 Pac. 778.

53. **Habeas Corpus**—Suspension of Writ.—The power to suspend the writ of habeas corpus is a legislative and not an executive function, and the Governor of the State, upon declaring military law in a section where insurrection exists, cannot suspend the writ.—Ex parte McDonald, Mont., 143 Pac. 947.

54. **Highways**—Pedestrians.—Pedestrians may use and traverse a highway at all its points, being chargeable only for the exercise of due care, measured by the use which they actually make of the highway, and this rule applies to city streets without reference to the amount of travel thereon.—Raymond v. Hill, Cal., 143 Pac. 743.

55. **Homicide**—Defense of Home.—Under Rev. Laws 1910, §§ 2334, 2342, a man may defend his domicile against every unlawful invasion, and may defend himself and those within it against violence, without the necessity of retreat, even to the taking of life, if apparently necessary to prevent a felony.—Armstrong v. State, Okla., 143 Pac. 870.

56.——Dying Declaration.—Where deceased was anesthetized shortly after the shooting, and was given opiates up to the time of his death, the burden is upon the one offering a dying declaration to show that deceased was rational when he made it.—Jolloy v. State, Tenn., 170 S. W. 58.

57. **Homestead**—Mortgage.—A mortgage of a homestead in which the wife did not join was void ab initio, though the husband and wife were living apart at the time it was executed.—Johnson v. Chandler, Vt., 92 Atl. 26.

58. **Husband and Wife**—Alienation of Affections.—In an action by a wife for alienation of affections, evidence of mental suffering was admissible to show damage, without a special allegation in the declaration.—Frederick v. Morse, Vt., 92 Atl. 16.

59.——Descent.—An undivided half interest in realty acquired by deceased during his first marriage passed to the minor children of such marriage on the death of his first wife.—Festivan v. Clement, La., 66 So. 304.

60.——Husband as Agent.—Married woman held liable on obligations incurred by her husband in the management of her farm which she turned over to him to manage, but not on his obligations incurred in buying and selling tobacco.—Corn v. Meredith, Ky., 170 S. W. 22.

61. **Insane Persons**—Deeds.—The rule that a deed, voidable because entered into by a person of unsound mind, carries title and must be disaffirmed by the grantor or his heirs, accompanied with an offer to restore the consideration, does not apply where the mental incompetency is known to the grantee.—Barkley v. Barkley, Ind., 106 N. E. 609.

62. **Injunction**—Jurisdiction.—Equity has jurisdiction to enjoin state officers from enforcing a state peddlers' law as against interstate commerce transactions, though the statute provides that its violation shall be punishable as a criminal offense.—Grand Union Tea Co. v. Evans, U. S. D. C., 216 Fed. 791.

63. **Innkeepers**—Loss by Customer.—Where a patron of a restaurant, having notices posted that it was "Not responsible for loss of coats," hung up his overcoat without calling the attention of defendants to it or asking that they take charge of it, held that defendant was not liable for its loss.—Gilson v. Pennsylvania R. Co., N. J., 92 Atl. 59.

64. **Insurance**—Void Insurance.—A policy written in Pennsylvania by an agency not authorized to do business in North Carolina on property located in that state is not void under Revisal 1905, § 4763; particularly where the company writing the policy and other agents of that company were authorized to do business in the state.—T. T. Hay & Bro. v. Union Fire Ins. Co., N. C., 83 S. E. 241.

65. **Intoxicating Liquors**—Personal Use.—Pub. Laws 1907, c. 1014, declaring it unlawful to sell or keep for sale intoxicating liquors in a certain city, prohibits importation for sale, merely, and not for personal use.—Southern Express Co. v. City of High Point, N. C., 83 S. E. 254.

66. **Judgment**—Constructive Trustee.—After verbal sale of land, followed by part payment, possession, and making of improvements, vendor held constructive trustee for purchaser, and judgment creditor of vendor acquired no lien on the land.—State Bank of Decatur v. Sanders, Ark., 170 S. W. 86.

67.——Forfeiture.—A judgment declaring a forfeiture of a street railway franchise as to the portion of the line not completed within the time fixed is not conclusive as to the validity of the franchise as to the remainder of the line, where no issue as to such validity was raised by the pleadings.—People v. Los Angeles Ry. Corporation, Cal., 143 Pac. 739.

68.——Receivership.—In an action on a Virginia judgment, it was no defense that it was uncertain in amount because of an equity in securities in the hands of the receiver in Virginia of an insolvent corporation, a party defendant in the bill on which the judgment was obtained; any remedy being against the receiver.—Swecker v. Reynolds, Pa., 92 Atl. 76.

69. **Judges**—Disqualification.—That the judge's law partner was the state's attorney for a judicial circuit held not to disqualify him from trying a criminal case in a court, where such state's attorney had nothing to do with the prosecutions before it.—Coleman v. Fisher, Fla., 66 So. 290.

70. **Landlord and Tenant**—Adverse Possession.—The possession of a tenant and of those succeeding to his possession is that of his landlord, and so long as the relation of landlord and tenant exists, the tenant cannot acquire an adverse title as against his landlord; but one who enters as tenant is not precluded from subsequently holding adversely to his landlord.—Gee v. Hatley, Ark., 170 S. W. 72.

71.——Damages.—She measure of damages for a lessor's breach of a farm lease was the value of the privileges granted by it subject to its conditions and all probable contingencies.—Cornelius v. Lytle, Pa., 92 Atl. 78.

72. **Larceny**—Pawnbroker.—In a prosecution of a pawnbroker for larceny after trust in the

conversion of a watch and ring, a pawn ticket similar to that given for the watch and ring held admissible on intent.—Wilensky v. State, Ga., 83 S. E. 276.

73. **Licenses**—Gross Earnings.—Const. art. 13, § 14, imposing a gross earnings tax on gas and electric light companies, and exempting them from all other taxes and licenses, held to exempt them from liability to pay license fees required by Motor Vehicle Act, §§ 4, 5, as a condition to the registration of motor vehicles used by such companies exclusively in their business.—Pacific Gas & Electric Co. v. Roberts, Cal., 143 Pac. 700.

74. **Limitation of Actions**—Accrual of Action.—Where services are rendered under an agreement that compensation is to be made at death, the amount does not become due until death, and limitations do not run until that time.—Helsabeck v. Doub, N. C., 83 S. E. 241.

75. **Logs and Logging**—Removal of Timber.—The owner of land, who conveys the timber with the right to remove it, without limiting the time for the removal, is not entitled to a cancellation of the conveyance because the purchaser failed to remove the timber within a reasonable time.—Forest Product & Mfg. Co. v. Buckley, Miss., 66 So. 279.

76. **Malicious Prosecution**—Probable Cause.—In an action for causing to be issued without probable cause a search warrant, the plaintiff shows a prima facie case when he proves that property was not found, and that for a long time plaintiff had shown a good reputation.—Smith v. McDuffee, Ore., 143 Pac. 929.

77. **Mandamus**—Defined.—A writ of mandate is for the purpose of compelling the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station.—Davies v. Board of Com'rs of Nez Perce County, Idaho, 143 Pac. 945.

78.——Remedy.—Where the board of an improvement district declined to allow a property owner to set off against his assessment on account of improvements already made by him, mandamus is not his proper remedy.—Casey v. Trout, Ark., 176 S. W. 75.

79. **Master and Servant**—Compensation.—That managers employed by a book company began the organization of a rival corporation in the same business, in consequence of which they were discharged, held not to deprive them of their right to compensation earned prior to their discharge.—Ely v. King-Richardson Co., Ill., 106 N. E. 619.

80.——De Facto Officer.—Where a city commissioner acted as such on the day on which his resignation became effective, his acts were not those of a de facto officer, since he was acting under no color of right to the office.—Loughran v. Jersey City, N. J., 92 Atl. 55.

81.——Employment.—Where defendant breached a contract of employment, plaintiff is entitled to recover in a single action, instituted before the time for performance had expired, all damages flowing from the breach.—Edwards v. Plains Light & Water Co., Mont., 143 Pac. 962.

82.——Proximate Cause.—Where plaintiff was injured by the breaking of a scaffold which he had himself constructed, the injury was the proximate result of plaintiff's own negligence, and not the master's failure to provide a safe place to work.—Yazoo & M. V. R. Co. v. Perkins, Miss., 66 So. 273.

83.——Safe Place to Work.—Helper in mine who, upon request, assisted in placing a prop to hold the roof held not engaged in making the mine safe, so as to relieve employer from liability for the helper's death from falling rock.—Borderland Coal Co. v. Small, Ky., 170 S. W. on such examination by an expert.—Hobbs v. Davis, Cal., 143 Pac. 733.

86.——Withdrawal from Entry.—Under Const. art. 4, § 3, and the statutes relating to the disposition of mineral and oil lands, the president had no constitutional authority to withdraw from entry over 3,000,000 acres of oil lands in California and Wyoming in aid of proposed legislation affecting the use and disposition of petroleum deposits.—United States v. Midway Northern Oil Co., U. S. D. C., 216 Fed. 802.

87. **Monopolies**—Labor Union.—The rule of a labor union forbidding the members of one local to work within the jurisdiction of another local without permission, when applied to a member who goes from one state to another to secure employment, does not violate the federal anti-trust act.—Monroe v. Colored Screwmen's Benev. Ass'n, No. 1, of Louisiana, La., 66 So. 260.

88.——Patterns.—Illegality, under the anti-trust laws, of contract to purchase patterns, which provided that buyer should only sell patterns of the seller, held not to defeat a recovery of the price for patterns received by the buyer.—McCall Co. v. Parsons-May-Oberschmidt Co., Miss., 66 So. 274.

89. **Mortgages**—Parties.—Where, in suit to foreclose mortgage by husband and wife on land of wife, plaintiff, without making heirs of wife parties, obtained a judgment for sale of land to satisfy secured note and unsecured individual note of the husband, providing for payment of surplus to husband, the judgment and sale were properly set aside over the objection of the husband.—Farmer v. Greene, Ky., 170 S. W. 17.

90.——Wills.—If an assignment of a mortgage by testatrix before she made her will was merely for collection, the avails would be hers, and pass under the residuary clause of her will.—Hopkins v. Sargent's Estate, Vt., 92 Atl. 14.

91. **Municipal Corporations**—Legislative Capacity.—A town in administering a water system, even within its own limits, does not act in a legislative capacity, but in a proprietary and only quasi public capacity.—Marin Water & Power Co. v. Town of Sausalito, Cal., 143 Pac. 767.

92.——Negligence.—Where the complaint alleged that defendant negligently ran his automobile, which was driven wantonly and maliciously at a speed in excess of 20 miles per hour, into plaintiff, the gravamen of plaintiff's case is negligent driving, and not wantonness and malice due to driving in excess of 20 miles per hour.—Townsend v. Butterfield, Cal., 143 Pac. 760.

93.——Police Power.—A city held not liable in damages to a railroad company because of the passage of an invalid ordinance in the good faith exercise of its police power by which the cost of the railroad company's operation was increased.—City of Chicago v. New York, C. & St. L. R. Co., U. S. C. C. A., 216 Fed. 735.

94.——Streets.—A city must keep its streets and sidewalks in a condition sufficiently safe to enable pedestrians to cross gutters and intersections without danger.—Smith v. City of New Orleans, La., 66 So. 319.

95.——Street Obstructions.—Where a railroad right of way became an established street, an ordinance prohibiting telegraph poles more than 24 inches from the curb intended to compel the removal of telegraph poles in the center of the street is not unreasonable.—Norfolk Southern Rwy. Co. v. Morehead City, N. C., 83 S. E. 259.

96. **Navigable Waters**—Riparian Owner.—A littoral or riparian owner of land on navigable tide waters has no right of access to the deep waters over intervening tide lands and a

98. **Nuisance**—Abatement.—The nuisance not being the building in which dead animals were converted into fertilizer, but the business or the manner in which it was conducted, the matter of an abatement should not be intrusted to the sheriff by a mere order to abate, without instructions as to how it be done.—Wright v. State, Tenn., 170 S. W. 57.

99. **Obstructing Justice**—Fictitious Action.—Where a physician, conspiring with certain attorneys, induced a party to bring suit for injuries, when in fact he had not been injured, the physician was guilty of obstructing justice, a common-law misdemeanor, and was punishable therefor in the ordinary manner.—Melton v. Commonwealth, Ky., 170 S. W. 37.

100. **Partnership**—Association.—An association formed among the signers of notes given for the price of a horse to be owned by such signers does not, constitute a partnership within Rev. Codes, § 5466, unless the signers intend to carry on a business together and to share in the profits.—Croft v. Bain, Mont., 143 Pac. 960.

101. **Pawnbrokers**—Municipal Ordinances.—Under a municipal ordinance requiring pawnbrokers to secure a license, and persons lending money upon personal property to pay a license fee, the fact that a party carried on a pawnbroking business without a license will not invalidate chattel mortgages, taken as security for loans upon personal property; the two businesses being wholly distinct.—Wood v. Krepps, Cal., 143 Pac. 691.

102. **Payment**—Directions to Make.—Where a debtor directed the application of payments to a secured debt, his failure to object to the application of such payments to other accounts is not a ratification of such application.—P. Ballantine & Sons v. Fenn, Vt., 92 Atl. 3.

103.——Mistake of Fact.—Where hotel steward deposited the hotel money to his own account, and a check of the steward on that account, given to a creditor of the predecessor of the hotel owner, was paid out of such funds, the owner cannot recover the money paid as a payment made under mistake of fact.—Leavitt v. Leighton, Mass., 106 N. E. 634.

104. **Principal and Agent**—Instructions.—An instruction that a principal ratifies the acts of the agent when he approves them with full knowledge, and, if he approves that which is beneficial, he is bound by other provisions of the contract, is erroneous, because not extending the condition of knowledge to the whole charge.—L. C. Smith & Bros. Typewriter Co. v. McGeorge, Ore., 143 Pac. 905.

105.——Scope of Authority.—Under a contract for the sale of a traction engine, a local agent, on ascertaining that the engine did not comply with the warranty, had no authority to direct the buyer to take the engine home or try to at the seller's risk.—Nichols & Shepard Co. v. Stubbs Thresher Co., Ky., 170 S. W. 4.

106. **Receivers**—Mortgage Creditor.—Where a mortgage creditor of a corporation permits a receiver to sell the mortgaged property under order of court, the proceeds must bear their proportionate share of the fees of the receiver and his attorney.—In re Receivership of Farmers' Union Warehouse Co., La., 66 So. 315.

107.....**Removal of Causes**—Diversity of Citizenship.—In action against railroad company and its crossing flagman for death, failure of jury to return verdict against the flagman held not to show bad faith in joining him as a defendant or to entitle the railroad company to remove the cause on the ground of diverse citizenship.—Illinois Cent. R. Co. v. Outland's Adm'x, Ky., 170 S. W. 48.

108. **Sales**—Agent.—Where a contract by its terms constitutes one party a purchaser from the other, the use of the words "agents" and "sales agents," implying that such purchaser is an agent, does not change the relationship.—Commercial Credit Co. v. Girard Nat. Bank, Pa., 92 Atl. 44.

109.——Payment.—Where a contract of sale was silent as to the time of payment, and nothing to the contrary appeared, the seller was entitled to payment only on delivery.—Burlington Paper Stock Co. v. Diamond, Vt., 92 Atl. 19.

110.——Waiver.—Where a buyer of a traction engine, with knowledge that it did not work well and after notifying the seller of such fact, used it for ten months, and then attempted to surrender it at a place different from that of sale, the warranty was waived.—Nichols & Shepard Co. v. Stubbs Thresher Co., Ky., 170 S. W. 4.

111. **Searches and Seizures**—Waiver.—The consent of plaintiff's wife, on being shown a search warrant to a search of the premises, waived informalities in the complaint, writ, and appointment of the officer.—Smith v. McDuffee, Ore., 143 Pac. 929.

112. **Specific Performance**—Statute of Frauds.—A contract of sale of land will be specifically enforced, though the writing affords an insufficient description of the property, where the evidence establishes a state of facts taking the case out of the statute of frauds, and supplying the description.—Hirschman v. Forehand, Ark., 170 S. W. 98.

13. **Street Railroads**—Forfeiture.—An attempt by the predecessor in interest of the holder of a street railway franchise to construct a railroad along a portion of the route, forfeited for failure to complete in time, does not divest the title of the company to the completed portion.—People v. Los Angeles Ry. Corporation, Cal., 143 Pac. 739.

114. **Taxation**—Public Utility.—The operation of a municipal ice plant by a small city operating municipal waterworks and electric lighting systems held not "strictly" a public activity, and could not be maintained by the exercise of the taxing power under Const. art. 224.—Union Ice & Coal Co. v. Town of Ruston, La., 66 So. 262.

115. **Tenancy in Common**—Contribution.—When one tenant in common has paid a debt or obligation for the benefit of the joint property, or has discharged a lien or assessment imposed upon it as a common burden, he is entitled to contribution from its cotenant.—Willmon v. Koyer, Cal., 143 Pac. 694.

116. **Threats**—Threatening Letter.—Accused, who wrote trespasser that if he did not compensate accused for the damages he would prosecute him, is not guilty of sending a threatening letter, under Code 1906, § 1364.—State v. Ricks, Miss., 66 So. 281.

117. **Trial**—Evidence.—Where the case does not show that the testimony sought to be elicited by a question is material, and there is no offer, the exclusion of the testimony is not error.—Seeley v. Central Vermont Ry. Co., Vt., 92 Atl. 28.

118. **Trusts**—Care of Property.—Where trustees offered evidence that repairs to the trust property were necessary, that the work was done, and that the price was according to the regular course of trade, evidence of its reasonableness need not be produced.—In re Dreier's Estate, N. J., 92 Atl. 51.

119.—Estoppel.—Where trust deed by husband and wife was ineffective, acts of trustee after husband's death, with concurrence of wife, held to give the beneficiaries no right by way of estoppel.—Niccolls v. Niccolls, Cal., 143 Pac. 712.

120.——Failure of Purpose.—A trust, whether limited to a life or a term of years, will not be upheld, where its purpose fails before the expiration of the life or term.—In re Packer's Estate, Pa., 92 Atl. 65.

121.——Return of Money.—In a suit in equity to establish a trust in the proceeds of a resale of property, obtained from him by defendant for less than its true value, through fraud in which defendant participated, complainant is not required to return the money received by him for the property.—Conner v. Craig, U. S. C. C. A., 216 Fed. 729.

122. **Vendor and Purchaser**—Notice of Adverse Possession.—In an action to quiet title, where defendant, upon representations by plaintiff's predecessor in title as to agreed boundary lines, immediately took possession of the land up to such boundary, the plaintiff was put upon notice of the facts and charged with notice of the rights of the defendant.—Grants Pass Land & Water Co. v. Brown, Cal., 143 Pac. 754.

123.——Waiver.—Delay during the time parties to a contract are negotiating for a settlement is not a waiver of the right to rescind.—Brown v. Aitken Vt., 92 Atl. 22.

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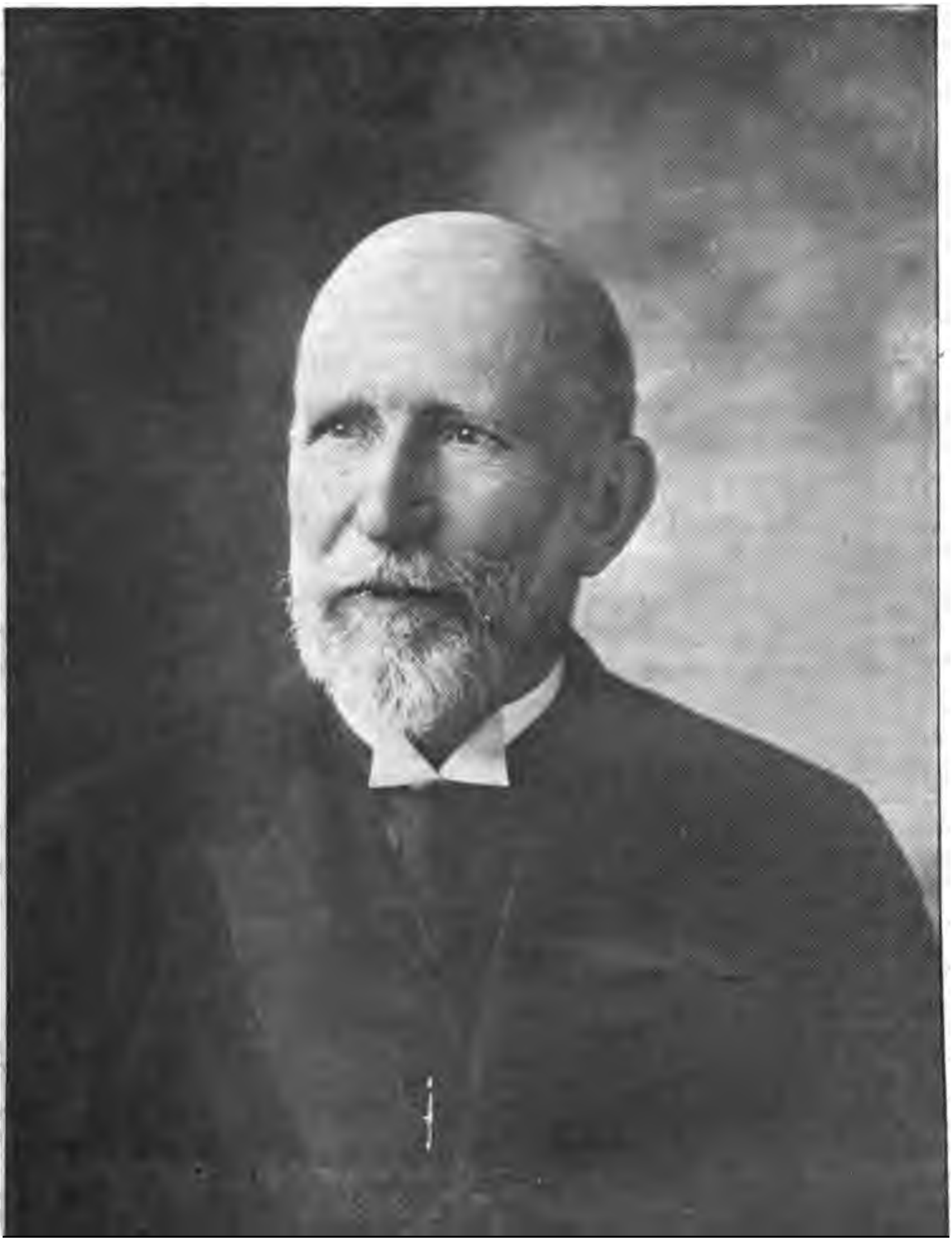

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SALE OF MACHINERY TO PURCHASER IN ANOTHER STATE THERE TO BE INSTALLED BY SELLER AS TRANSACTION IN INTERSTATE COMMERCE.

It seems to us that Texas Court of Civil Appeals greatly misconceives recent controlling decision in holding, that where a seller of a plant in one state to a purchaser in another state, with the seller, as part of his contract, to install the plant in the place where shipped, makes the transaction local, so as to exclude it, a foreign corporation, from access to the courts for not obtaining a permit to do business in a state. York Mfg. Co. v. Colley, 172 S. W. 206.

The court confesses to having entertained a different view upon this subject, and relies on Browning v. City of Waycross, 233 U. S. 16, 34 Sup. Ct. 578, as controlling its present view. We, however, regard that case as determining the exact reverse to what the Texas court holds.

The Browning case involved the question of a municipality requiring an agent of a foreign corporation selling lightning rods, the contract of sale including the affixing of the rods he sold to the houses of purchasers, to take out a license therefor. The Supreme Court held that he, the agent, was not protected by the commerce clause.

The court said: "We are of the opinion that the court below was right in holding that the business of erecting lightning rods, under the circumstances disclosed, was within the regulating powers of the state, and not the subject of interstate commerce, for the following reasons: (a) Because the affixing of lightning rods to houses was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of state authority. (b) Because, besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties, by the form of their contract, to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause. It is manifest that if the right here asserted were recognized, or the power to accomplish by contract what is here claimed were to be upheld, all lines of demarcation between national and state authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one state to the other, and intended to be used after delivery in the construction of buildings or in the making of improvements in any form, would or could be made interstate commerce."

Applying this reasoning to the case before the Texas court and it must be said that what the corporation's engineer was to do was "wholly separate from interstate commerce," and Texas could, as the city of Waycross did as to the lightning rod agent, regulate the business of the corporation's engineer—regulate his business of installing machinery or of a plant shipped in interstate commerce.

The principle announced in the Browning case is a very salutary one, and its effect is merely to limit a technical rule good between the parties but having its limitations, so far as the public interest is concerned. This interest says, in effect, that what a contract provides for to make a complete delivery and to be done after interstate commerce has protected a shipment to the extent it was intended to protect it, shall not be free from local regulation, it being only by force of the contract that the afterthing is provided for. In such event, whoever engages to perform the afterthing submits this afterpart to the same regulation as though it were

How is the situation changed so far as the draft issued by this collecting bank is concerned? A bank in such capacity is as well recognized as in any other of its functions. When its own patrons are drawn on, and the draft sent to it, it stands to principals as in other cases. If there is any difference, it would be whether or not a bank sending a draft to the bank of a depositor drawee would be acting with prudence or discretion. But that question would be between the customer of the sending bank and its customer. And the same rule should apply as to a sending bank forwarding a note to a bank where it is expressed to be payable, though the maker be its own depositor.

Let us apply this last observation to this case, and suppose that the sending bank had forwarded the note to another bank and instructed it to demand payment at the place where the note was made payable. It would either have collected the cash or it would have received the bank's draft in payment. If it had received the latter, this surely would have been on the theory that it was equivalent to cash. It would indeed have been so out of the ordinary rule for it to have taken a draft in favor of the sending bank as to make the collecting bank responsible. But if it received the cash the rule we first above discussed would have applied.

The court says: "We think it must be said upon this record that at the time the defendant bank mailed the draft in question it was not under obligation to do so; that it did mail the same under a clear mistake of fact which had been induced by legal fraud and imposition; that it mailed the draft in good faith, in the reasonable belief that the conditional credit to the western company had become absolute by the honor of the checks." But it stands out clearly, that only by the accidental circumstance of its being the agent of the sending bank was it in any position to take advantage of its "clear mistake," and we do not think that a rule of law predicated upon such a circumstance ought to be declared.

The sending bank was the holder of paper acquired in due course and when it forwarded it to the collecting bank, it was entitled to have that bank undertake to collect it just as had it sent it to any other bank. There is here introduced a confusion in the application of a well-settled principle arising out of an accidental selection of a collecting agent, which, however, was bound to see that its principal should have the same rights as had any other agent have been selected. Courts seem sometimes to declare a principle on mere bookkeeping, when that is merely to stand for the substance of things accomplished. In this case there is allowed escape to a bank by a merely fortuitous selection, which should have differentiated its position as an agent in no respect whatever.

NOTES OF IMPORTANT DECISIONS

BANKRUPTCY—RELEASE OF SURETY ON BOND IN ATTACHMENT BEGUN IN FOUR MONTHS PRIOR TO PETITION.—Iowa Supreme Court held very properly, it seems to us, that where defendant in attachment gave a delivery bond and within less than four months after the suing out of attachment petition in bankruptcy was filed to have him adjudicated a bankrupt and he was so adjudicated, the surety on such bond was thereby released. Corody & Co. v. Hartzell, 151 N. W. 97.

The court said: "The function of the delivery bond is merely to discharge the property. It does not dissolve the attachment, but takes the place of the lien. The attachment continues, the bond being conditioned to turn the property or its value over to the sheriff when required to satisfy the debt and thereby discharge the same." But bankruptcy nullifying the attachment, "the lien of any levy thereof is dissolved and possibility of the happening of the contingency on which the efficacy of the bond depends is rendered impossible."

The court goes on to say that: "Any other conclusion would lead to the absurd result that the surety on such a bond might be compelled to deliver property therein or pay its value to discharge the portion of the debt remaining unsatisfied by dividends in bankruptcy, notwithstanding the identical property had been seized by the trustee in bankruptcy by virtue of its release from the lien of the attachment."

The lien hereby declared to be released is not like a sub-contractor's lien which is given on property improved, which is not released because of the contractor's bankruptcy, a situation considered by us in 69 Cent. L. J. 100. The sub-contractor's lien is a lien in rem and a special way is provided for its enforcement, and it is a lien not on the bankrupt's property, but on the property of another than the bankrupt. It is also a specific lien for a particular benefit.

An attachment lien is general in its nature rendered specific by levy, and while it and the sub-contractor's lien must be preserved, yet the latter is not by seizure like the former. Seizure is by fact of the right of attachment being good and remaining good by force of continuing law. When the continuing law is displaced, it should be as if it had never been begun.

We doubt, however, whether the fact, that the property in the delivery bond and that seized by the trustee might be identical would be any reason for not holding the surety. If the bankruptcy act intended there should be no disturbance in the situation, the fact that the bond opened the way for disturbance would make the surety liable at all events. What the law meant was that the debtor could transfer his property for a present consideration up to the time of petition filed for adjudication and creditors should have no rights as to attachments filed within the prescribed period.

BANKS AND BANKING—RIGHT OF BANK TO INTERPOSE SET-OFF FOR DEPOSITOR'S BENEFIT.—The New York Court of Appeals considers the question of the value and efficiency of a certified check and incidentally it was held that a bank may not escape its liability upon certification of a check by proving a set-off in favor of a depositor. Carnegie Trust Co. v. First Natl. Bank of N. Y., 107 N. E. 693.

It was only necessary to hold this much in

fuse to pay for it, and therefore, generally speaking, it could not urge a set-off or a counterclaim in favor of any drawer. Whom would the judgment bind?

Speaking of a case where a bank pays a sum of money by its own check on another bank, the court says: "If the bank that made the payment has a cause of action for money paid under a mistake, it must invoke that remedy directly." As seen by case referred to in editorial in this issue, courts generally rule against any right of a bank to plead mistake in a payment, this ruling being regarded as an exception to the general rule. But even were this otherwise, it is very plain it cannot involve any drawee bank in any question between it and the payee without itself attempting to restrain drawee bank by a direct proceeding. It would have small chance to effect any result where by a course of business dealing the question has passed beyond its control by acceptance and payment in cash or by certification.

The court well says: "If the holder of a check, after procuring it to be certified by a bank, may be required to litigate the question whether the maker of the check had a right of counterclaim or set-off, the transaction has not been safely closed. That has not heretofore been supposed to be true."

ASSAULT AND BATTERY—WILLING ENTRANCE INTO FIGHT AS DEFENSE IN ACTION FOR DAMAGES.—In Lewis v. Fountain, 84 S. E. 278, decided by Supreme Court of North Carolina, a refused request by defendant for an instruction read as follows: "If you find from the evidence that plaintiff and defendant were willingly engaged, in a mutual assault upon each other with pistols, brought on by the plaintiff going to defendant's house and engaging in an altercation, and the plaintiff was injured while they were willingly assaulting each other, then plaintiff is not entitled to recover damages resulting from his own wrong."

The court said: "This was properly refused. Bell v. Hansley, 48 N. C. 131; White v. Barnes, 112 N. C. 327, 16 S. E. 922. To have given this instruction would legalize duelling or other fighting by consent or affrays."

ly because it is supposed that to deny it would be to make a public wrong lawful. There is no connection between the two aspects of such a matter. Rather do we agree with Kentucky Court of Appeals in its ruling that an agreement to fight being unlawful the law will refuse damages to either party. Lykins v. Hammick, 144 Ky. 80, 137 S. W. 852.

But in what a singular position does the North Carolina ruling place courts? It sets aside the rule "ex turpi causa, non oritur actio," the rule of contributory negligence barring recovery, and puts upon courts the duty of unravelling a matter where both sides are in the wrong.

For example, if one party to an affray willingly entered upon—no matter which party—sues, the other may counterclaim and the verdict be merely arrived at, not according to any view of right, but merely by the extent of the damage inflicted. What does the law care about a question of that kind?

It may be that statute might make the slayer of another in a duel liable to the latter's family. Such statute would be sustainable under police power as discouraging duelling, but hardly, we think, on any other principle. There is also another principle which seems to apply and that is *volenti non fit injuria*. That may apply as well where one puts himself where he probably may be hurt as where he consents to a particular injury.

MAILING A LETTER AS DETERMINATIVE OF PLACE OF DELIVERY OF A CONTRACT.

A well known author has said, and what he says is supported by universal authority, that :"Notes, deeds and other contracts of that character do not become completed and binding contracts merely by the fact of the promisor's signing them. They must also be delivered. Hence if the signing occurs in one state, while the delivery takes place in another, the latter state, not the former, is the

contracts of that character," including the written acceptances of a proposal, are signed and mailed, or, if reply is by telegram, where the reply message is delivered to the telegraphic company, I purpose to take issue with such deduction.[2] Two cases at the opposite extremes on this question are found in Illinois[3] and New York.[4] The former of these cases shows that a wife, whose domicile was in Illinois, was temporarily in Florida. At the solicitation of her husband she executed a note and deed of trust valid under Illinois law, but invalid by the law of Florida regarding contracts of married women. The Illinois Supreme Court ruled in a suit attempting to foreclose the deed of trust on property in that state that the transaction was governed by Florida law. The opinion said: "A note takes effect from the time of its delivery and not from its date. Until the maker of a note parts with the possession and control of the instrument he may cancel it or dispose of it as he pleases, and a note is not executed until delivered. The note in this case was made in Florida and the trust deed was signed at the same time. * * * (The husband) had designated the United States mail as the means of transmission of the note and trust deed to him and (the wife), in compliance with his request, deposited them in the mail in the state of Florida. When the note and trust deed were so deposited (the wife), the maker, parted with the possession of and lost all control over the papers and all right to retake or reclaim them. Under such circumstances, the delivery was complete in Florida, when the note and the trust deed were placed in the mail, directed to Charles H. Tobey, Trustee of the

Before adverting to the New York case, I may observe, that, if this mailing had been done on a reservation within state lines, there would seem no necessary conclusion that it made a delivery within that state, because the mailing would be essentially federal business and the location of the reservation but a fortuitous circumstance. Is not a postoffice or a mail station on the same footing as reserve territory within the confines of a state?

In the New York case the facts show that a renewal note was dated at Washington, D. C., where the arrangement for renewal was made and the note was there handed to the maker to execute, and as intended he took it to New York where he signed as maker and appellant as indorser and mailed it to payee. The note provided for a rate legal in Washington but usurious in New York. Appellant set up usury as a defense to the note as a New York contract, and the defense was held by New York court to be untenable.

It was said: "There was here every essential to a valid contract under the laws of plaintiff's domicile. * * * For the affixing of the signature to the note by the maker and indorser, however important as acts, was yet but a detail of the performance and execution of the contract, which had been agreed upon with the plaintiff. * * * When appellant indorsed the note, which had been prepared and was brought to him, and sent it through the mail to the plaintiff, his engagement was with respect to a contract validly made according to the laws of the District of Columbia, and when the note was the court to hold, because the note was not actually signed and indorsed in the District of Columbia, where the agreement it evidenced was made * * * that the contract was void as contravening the usury laws of the place of signature would be intolerable and against decisions of this court." Here are cited among other cases, two by Minor in support of the conclusion that the place of signature and mailing is the place of the contract,[5] and it may be well to briefly notice these cases at this point.

The former case shows a renewal note agreed to by a Pennsylvania corporation which was made, dated and payable in New York and mailed to the plaintiff in Pennsylvania. The discount was at a rate lawful in Pennsylvania, but unlawful in New York. The defense of usury was disallowed. The court said, among other things, that: "Neither can it be claimed, that because the obligation, instead of being signed in the state where the contract was made, is signed in another state and sent by mail to the place of contract, it must be governed by the usury laws of the place where it was signed."

In the latter case it was held if a case where a renewal note was given at a rate usurious in New York, but lawful in Illinois, where it was executed and mailed, that it was an Illinois contract, it being said it was not shown there was any intention to evade the usury laws of New York, "and the note was manifestly executed with reference to the laws of the state of Illinois, where the maker resided." The sending by mail was referred to as a mere incident. As we have seen.

mit a signed instrument is merely a circumstance, which in no way fixes or tends to fix the place of delivery. The intent of the parties as to what law shall govern subordinates the use of the agency to the purpose of the parties to a contract.

The Rule That Mailing Shows Place of Contract Limited.—In one[6] of the cases cited by the Burr case *supra*, the defendant claimed under New York law, and the plaintiff under Maryland law. The notes were drawn in Maryland and sent to New York there to be signed and returned by mail. The opinion said: "No particular place of payment is specified in either note. The authorities agree, that, if no particular place of payment is specified in a note, or if in other words, it is payable generally, the law of the place where it is made determines not only its construction, but also the obligation and duty it imposes on the maker. * * * But by the place where the note is made is not meant the place where it is written, signed and dated, but the place where it is delivered, delivery being essential to its consummation as an obligation." It is said that by depositing such a "note in the mail, with the intent that it shall be transmitted to the payee in the usual way, the maker parts with his dominion and control over it, and the delivery is in legal contemplation complete." The court, therefore, held as to this note, payable generally, that it was a New York note, but this was far from holding, that such deposit would control as to any other kind of a note. It was said that: "In such cases the post office may be regarded as the common agent of both parties; of the maker for the purpose of transmitting the note to the payee, and of the payee for receiving it." But this does not make the post office a "common agent of both parties," where the maker is to deliver a note intended by the parties to be a contract of another place than where it is mailed. On the contrary, if deposit in the post office fixes the place of contract, it must be supposed that both parties intended accordingly.

The failure to apply the principle to notes signed and mailed in one state is shown in the fact of their being payable in another. Thus a Massachusetts case[7] ruled that: "As the instrument was a promissory note and as it was payable in South Dakota, and was sent to the payee by mail and received by him in that state, it was a South Dakota and not a Massachusetts contract."

A striking parallel to the Burr case *supra*, with an opposite conclusion, is found in a Tennessee case,[8] where the ruling was that the note was a contract in the state where it was made payable. The note was executed in Tennessee by a married woman expressed to be payable in Ohio and sent to the payee there by mail. As a Tennessee contract it would have been void. The court said: "We think it quite plain that the note in suit is an Ohio contract, notwithstanding it was signed by Mrs. Harley in Tennessee, it having been delivered and consummated in Ohio, and is payable in that state, as the place of performance." Here it would appear that the court disregards the evidence of mailing as showing a delivery, but says though the mailing is in Tennessee, the delivery is in Ohio, thus implying that the post office is not the common agent of both parties, but only the agent of the sender of a note expressed to be payable in another state.

The Indiana case[9] referred to as au-

Burr case supports. Thus notes were made in Illinois payable at a bank in another state and sent to the latter by mail. In Illinois these notes by a married woman were valid and by Indiana law invalid. They were held to be Illinois contracts, but this was upon the theory that interpretation should be in favor of the validity of contracts. "This conclusion is supported by the rule of sanity and honesty that no contract must be held as intended to be made in violation of law, whenever by any reasonable construction it can be made consistent with the law and which it was competent for the parties to adopt." Had the fact of signing and mailing been deemed conclusive on the subject of delivery, this reasoning would be deemed not only unnecessary but very confusing indeed.

Where a note is signed for negotiation in another state—not to be a binding obligation until negotiated—it seems according to the weight of authority not to be completely delivered, though put in the mails for transmission, until it becomes a binding obligation."[10] Of these cases there is a strong dissent by two members of the court in the New York case and the Connecticut case is upon the same facts as the Mitchell case, which expressly dissents from its view.

The Chapman case *supra* has been succeeded by a case, which rules that there is no inherent lack of authority in a married woman to bind herself by signing a note in a state, where she cannot bind herself by her contracts, where it comes into the hands of an innocent holder without notice.[11]

There lie entirely outside of the question here considered cases holding that the *lex domicilii* controls without regard to where a contract by a married woman is made and delivered, so far as enforcibility in the courts of the domicile are concerned.[12] It would appear in these cases that the notes were sent by mail, but the court goes on the theory of the notes being North Carolina transactions without discussion of how they were delivered.[13] And it has been ruled to be a prerogative of sovereignty to define the disabilities not only of resident inhabitants, but also of those temporarily there.[14]

A Maine case[15] is very instructive on the question of mailing as a delivery. In this case the note was written in Maine and sent to Massachusetts by mail and to be returned in the same way to the payee in Maine. By the law of Massachusetts the married woman, a signer, as surety for her husband, could not bind herself. By the law of Maine she could. It was said: "Our opinion is that the note was made and intended by the parties to be paid in Skowhegan. For although it was signed in Cambridge, (Mass.) it was delivered to the payee in Skowhegan, (Me.); and it was not a completed contract until delivered. This proposition needs no citation of authorities, still we cite Laurence v. Bassett, 5 Allen, 140, as precisely in point."

The court then goes on to say: "But even if this were not conclusive, we should have no hesitation in deciding that the construction and legal effect of the note declared on must be determined by the laws of this state (Maine) on the ground that no contract must be held as intended to be made in violation of the law, whenever by any reasonable construction it can be made consistent with the law and which it was competent for the parties to adopt. Story, Confl. laws, § 305a."

Further, this opinion says: "The plaintiff's letter called for 'a good surety' to the note, the makers must be presumed to have intended a *bona fide* and not a *mala fide* compliance with the proposition. But if the note was made in Massachusetts and intended to be payable there, then it was illegal and void and an intended fraud by makers, since they must be presumed to have known the law of their domicile; whereas, if made or intended to be paid in this state, it would be legal and valid. It should, therefore, in the absence of any legal principle forbidding it, be considered as intended by the parties to have been made with reference to the law of the place where legal."

In a Virginia case[16] the proposition is stated that a note (one sent by mail) made in a particular country is to be deemed a note governed by the laws of that country, whether payable there or generally without naming any particular place." But: "These principles are predicated of the intentions of the parties, who are naturally and reasonably supposed to contemplate in the transaction the *lex loci contractus.*" In this case there were blanks to be filled, which when filled made this note payable in Maryland. It was said: "They must be taken as subject to the laws of Maryland by the combined operation of the acts and intentions of the parties." I think it would be difficult to distinguish this case from one where such blanks had been filled in the way they were filled, when they were signed.

ty, signed in Missouri and others signed in Iowa. Upon the signing in Missouri the payee turned over to his agent money to be delivered on the note being signed in Iowa. The note was dated in Missouri. The court held it to be an Iowa contract according to the intention of the parties.

Summary and Conclusion.—As I gather the Burr case *supra* it rules that intent cannot prevail over the fact of a signer trusting a signed document to an agency designated by the payee to receive it and deliver it to the payee. This is a curious conclusion, among other reasons, because the payee selects the agency. He tells the maker, in effect, that if he delivers it to the agency at the place of execution, this is the same as delivering it to him where he lives, and the court says that neither the intent of the maker nor the payee shall prevail. But if the maker selects the agency, it is evident the instrument is not delivered until the agency performs the service.

But independent of all this, it is said by the cases above cited and quoted from that all contracts are to be considered as delivered in the states whose laws are looked to for the determination of their validity, and though a married woman may have no power to bind herself in a particular state, yet if she undertakes to do so as to a contract intended to be governed by the laws of a state where she is competent to bind herself, she may as delivering the contract in another state be construed to be there present, even though the state of her incompetency be that of her domicile. *A fortiori* would this be true if she is only temporarily in a state where her contracts are void.

This seems to me to be the true idea of proper regard by one state for the laws of another. If one generally competent she signs, lawfully may intend the same thing in a state where she is competent. There is mere disability in a particular state as to contracts executed therein. There is no attempt to control the policy of another state. There possibly might be some question of comity, if a married woman's contract were sought to be enforced in a state whose policy prescribed disability, and some refinement might be indulged in as to a married woman's domicile and her temporary presence in such state, but such a question is wholly apart from anything I am here considering. One of the strongest reasons for delivery where the instrument is received by the sendee is that it amounts to nothing until it gets there. Therefore, a delivery of a void contract is no delivery at all, but a delivery being intended, it takes place, when there is something to be delivered.

Besides all this, when courts speak of the post office being an agent they fail to note, in my mind, an important distinction. It is not an agent in any sense to affect any contractional relations or any standing in contractural attitude of a party. It is simply like a machinery to convey or transport an article. If it were a mere mail chute in which a letter were deposited to be wafted by pneumatic pressure to another point, it ought not to make any difference where it began or where it ended. To call an inanimate thing an agent, when it is not even a corporation, seems a misapplication of a term. When we add to this the thought that the sphere in which it works is like a federal reservation in the state—for the benefit of all equally and not exclusively for any—the particular state in which it works seems immaterial, when a letter is confided to the agency or machinery in or on the reservation it

I refer in no way to cases which rule that the date of a written instrument is the time of its being mailed. This is a different proposition, and it would make no difference in such a case whether the post office were the common agent of both parties or the agent of only one. If it were contemplated that the mail should be used, there is inference to be drawn that the time it is used should be the beginning of the contract.

N. C. Collier.

St. Louis, Mo.

NEGLIGENCE—EMERGENCY.

FRISH v. SWIFT & CO.

Supreme Court of Nebraska. Feb. 12, 1915.

151 N. W. 165.

(Syllabus by the Court.)

On the issue of contributory negligence in an action to recover damages for personal injuries, where plaintiff was placed in a position of sudden peril without any fault on his part, the test of his conduct is that of a person of ordinary prudence confronted with the same circumstances, and this rule applies to cases in which the emergencies arise from accident or from acts of third persons or from negligence of the defendant.

ROSE, J. Plaintiff brought this suit to recover from his employer damages in the sum of $3,000 for personal injuries. From judgment on a verdict in favor of plaintiff for $2,000, defendant has appealed.

At the time of the injury plaintiff and about 50 other employes were working in the sheep department of the defendant's packing house in South Omaha. Sheep were handled at the rate of 200 an hour. When killed they were suspended from an overhead, moving, endless chain, running on small pulleys supported by a stationary iron rail swung from the ceiling. The slaughtered animals moved with the chain past plaintiff, who, in common with other butchers, had a distinct service to perform in the dressing of each animal. The cattle was stopped. The employes, without exception, hastened to places of safety. One jumped behind a post. Another crawled into a pit. Plaintiff climbed onto a three-inch railing, threw his left arm on the overhead rail already described, and clung to the chain with his left hand. Before the steer had been killed, and before the employes had returned to their places, the chain was started, drawing plaintiff's hand into the pulleys. This action was brought to recover resulting damages. The starting of the chain without notice or warning under the existing conditions is the negligence imputed to defendant. The latter denied negligence, and pleaded contributory negligence and assumption of risk.

Error in refusing to direct a verdict for defendant is one of the assignments. Under this head it is argued that plaintiff was guilty of contributory negligence as a matter of law, and that there is no evidence of actionable negligence on part of defendant. It is asserted that when plaintiff climbed onto the railing he knew the chain was dangerous; that it was unnecessary to put his hand on it; that he knew it was almost constantly in motion during working hours; that his act amounted to negligence; that he should have put his arm around the track in which the chain ran or grasped some other safe and convenient part of the structure. The truth of these assertions would not necessarily defeat the action on the ground of contributory negligence. It is undisputed that plaintiff was required to act instantly in the face of imminent peril. An infuriated steer, a few feet away, was charging toward him. No place had been provided for his safety. He had no time for deliberation. The machinery was motionless. The chain had been stopped. It was dangerous only when in motion. The butchers were not in their places to perform their work on moving carcasses suspended from the chain. Following the instinct of self-preservation, plaintiff's attention was directed to the movements of the dangerous animal. The situation was not created by plaintiff's negligence. In the analysis of his conduct under such conditions the law did not require mature deliberation in front of the approaching, infuriated steer or the wisest selection of the place to put his hand, while balancing on a three-inch railing. The test of contributory negligence in a situation of this character is not the same as that applied where there is no danger. Plaintiff was not guilty of contributory negligence as a matter of law. The issue was one of fact for the jury. The law has been correctly stated as follows:

"When a person without his fault is placed in a situation of danger, he is not to be held to the exercise of the same care and circumspection that prudent persons would exercise where no danger is present; nor can it be said that, as matter of law, he is guilty of contributory negligence because he fails to make the most judicious choice between hazards presented, or would have escaped injury if he had chosen differently. The question in such case is not what a careful person would do under ordinary circumstances, but what would he be likely to do, or might reasonably be expected to do, in the presence of such existing peril, and is one of fact for the jury." Pennsylvania R. Co. v. Snyder, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700.

The rule is not confined to cases where the peril was created by defendant's negligence, but is applicable to situations arising from accidents or from acts of third persons. Chattanooga E. R. Co. v. Cooper, 109 Tenn. 308, 70 S. W. 72; Cassida v. Oregon R. & N. Co., 14 Ore. 551, 13 Pac. 438; Alabama & V. R. Co. v. Lowe, 73 Miss. 203, 19 South, 96; Palmer v. Larchmont Horse R. Co., 112 App. Div. 341, 98 N. Y. Supp. 567; Wheeler v. Oregon R. & N. Co., 16 Idaho 375, 102 Pac. 347; Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 Pac. 53; Cannon v. Pittsburg & Birmingham Traction Co., 194 Pa. 159, 44 Atl. 1089; Lemay v. Springfield Street R. Co., 210 Mass. 63, 96 N. E. 79, 37 L. R. A. (N. S.) 43 (see note, page 57).

Affirmed.

MORRISSEY, C. J., not sitting.

NOTE.—*Emergency Caused by the Act or Negligence of a Third Person.*—It must be admitted that the statement in the instant case that "the rule (in emergency cases) is not confined to cases where the peril is created by defendant's negligence, but is applicable to situations arising from accidents or from acts of third persons" is greatly sustained by authority, all of the cases cited appearing to hold that way. In many cases where there is basis in authority for the rule in language found in cases, this language appears where by the facts defendant's negligence brought about the emergency. Therefore, these cases ought not to be deemed authority.

But there are cases directly to the contrary, and why if an act, intentional, negligent or excusable, by a third person is the immediate cause of an acts and the cause of the emergency is the proximate cause of injury. The law regards acts in an emergency not to be intervening links in the chain of causation, but the original cause jumps over them, so to speak, and of itself produces the injury.

Suppose, for example, a servant assumes the risk of working as a steeple jack and a third person does something to cause him to fall. The master ought not to be liable, and if he caused him in a sudden emergency to adopt the wrong course to save himself, equally the master ought not to be liable.

In Courier-Journal Job Prtg. Co. v. Haag, 155 Ky. 248, 159 S. W. 789, an employee was put on a machine by one not her superior and while at work she received a nervous fright causing her to place her finger under the machine whereby it was mashed. The court in holding that the master was not liable, said: "The sudden noise or movement of the door gave to the appellee, as she admits, a nervous shock, causing the involuntary placing of her hand in the machine. Neither the noise or the impact of the door against the machine was dangerous or unusual, nor the result of any negligence of the appellant. * * * It is perfectly clear * * * that no negligent act of the appellant has been proven to warrant a recovery against it for the injury."

In Voss v. Morris & Co., 169 Ill. App. 514, an administratrix sued for the death of decedent who lost his life in an attempt to rescue another servant from peril. He had no orders to attempt the rescue and there was no negligence of defendant in the servant attempted to be rescued being put in peril. Recovery was denied. The question we consider is not directly involved, but there is some relation thereto.

A rescue case in Texas Court of Civil Appeals illustrates this relation more clearly. It was held there in effect, that as the master could not anticipate the accident which happened to put a servant in peril, so it should not be held responsible for injury to plaintiff, another servant, in attempting his rescue. Linz Realty Co. v. McDonald, 133 S. W. 535. Acts in rescue are very greatly judged like acts in an emergency.

This same court previously said: "The confusion which naturally results when one is called upon to act suddenly in an emergency is frequently held to be sufficient to relieve against a charge of contributory negligence; but liability in the first instance must be predicated upon the negligence of the party sought to be held." Texas & P. Ry. Co. v. Myers, 125 S. W. 49.

In Trowbridge v. Danville St. Car Co., 1 Va. Dec. 823, 19 S. E. 780, deceased was killed by a street car where he dodged across the track to escape a vehicle. The court said: "If the defendant places a person in sudden peril, it is a very different matter than such sudden peril as was wholly unconnected with the defendant or any of his doings." Of course, it must be conceded, that if the sudden peril still leaves opportunity for the humanitarian doctrine to apply that is another case.

In Murphy v. Ry. Co., 140 Iowa 332, 118 N. W. 300, the rule was laid down that there can be

Where owner of a coal mine was required to maintain an extra exit, his failure to do this was found to be a contributing cause to a panic among employees, making him liable for acts in such panic causing an emergency. Wesley City Coal Co. v. Healy, 84 Ill. 126, 1 Mor. Min. Rep. 68. The court said: "The jury may well have found that the death was the direct result of the alarm and the alarm or fright resulted directly from the want of a second mode of escape." For the fire immediately preceding the alarm the implication is that there would have been no liability for the panic as it might not have occurred at all but for there being no extra exit. This is narrow reasoning, but it recognizes there must be negligence of party sued causing or giving rise to an emergency.

C.

ITEMS OF PROFESSIONAL INTEREST.

CHARLES A. BOSTON, OF NEW YORK—THE MAN WHO HAS MADE THE CODE OF ETHICS MEAN SOMETHING.

Among the number of those lawyers who have rendered distinct as well as distinguished services to the profession in the present generation one would expect to see the name of Charles A. Boston, of New York, whose picture is the attractive feature of our front cover page.

Born in Baltimore in 1863, and graduated from the Johns Hopkins University, Mr. Boston was admitted to the bar of Maryland in 1886, but three years later removed to New York City, where he has since zealously devoted himself to the practice of his profession. Mr. Boston has been almost continuously associated with Hon. Wm. B. Hornblower in the practice of the law, having been associated with him in many important suits, among which the Rice Will Case was probably the most celebrated.

While Mr. Boston has never sought nor held political office, he has never been unwilling to sacrifice time and thought in behalf of the profession to which he is such an ardent devotee. In local, state and national bar associations he has served on many committees, to the work of which he has always given more than a mere perfunctory attention.

He is one of the directors of the New York County Lawyers' Association and chairman of its Committee on Professional Ethics. In of service as chairman of the Section of Legal Education.

To indicate the zeal with which Mr. Boston performs the professional duties thus assigned to him, it was a matter of comment among members of the American Bar Association in their campaign a few years ago for new members, that Mr. Boston's record as a member of the Membership Committee from New York was among the most remarkable of the many good records made in that campaign. He succeeded in more than doubling New York's representation in the American Bar Association, giving the bar of that state the distinction of having sixteen per cent of the entire membership of the national body.

But the most important of Mr. Boston's professional services has been as chairman of the Committee on Professional Ethics of the New York County Lawyers' Association. This committee has been authorized to determine all controversies arising in the local bar association concerning the application of the Canons of Professional Ethics to particular facts and conditions. Queries are propounded impersonally and the answers of the Committee are given categorically to all of the points involved in a given query. These decisions are "handed down" in writing and published by the local association.

The work of this Committee has attracted wide attention, and its decisions are published by the legal press quite extensively. The Central Law Journal approved the plan at its inception and our past volumes for the last two years contain all the decisions handed down by this Committee. These decisions are also widely used in many law schools of the country for the purpose of illustrating the application of ethical principles.

Such a record of professional service deserves more than a passing encomium. Lawyers are still too few in number who regard their duty to their profession as being in no respect subordinate to their personal interests, and for this reason the bar of the country should pause occasionally to pay its respects to those who thus put professional ideals above the mere financial rewards of an honorable profession.

Such a career as that of Mr. Boston, while not so spectacular as some others, is of the

ANNOUNCEMENT BY THE AMERICAN BAR ASSOCIATION.

An important announcement has just been sent out by the treasurer of the American Bar Association, containing two items of news of interest to lawyers.

First, the annual subscription dues have been raised from $5.00 to $6.00; second, the Association has decided to publish a quarterly, to be known as the American Bar Association Journal.

The Journal will be published under the direction of the publication committee, of which Hon. Simeon E. Baldwin, of Connecticut, is chairman.

The Journal is not to contain articles, but will be devoted to publishing the news of the various meetings of the Association, as well as reports of the committees and other matters of special interest to members.

The Journal will be mailed free to all members of the Association, $1.50 of the dues being designated as a subscription to the Journal.

JETSAM AND FLOTSAM.

THE LEGAL ADVENTURES OF A FISH WORM.

The city of Bucyrus, Ohio, has a cause celebre in which a little fish worm plays the part of the arch villain which has set several estimable citizens of that city at each others throats, legally speaking.

Writing to the Ohio Law Bulletin, Gen. E. B. Finley, of Bucyrus, describes with rare literary grace the occasion for this legal tempest.

"A good-for-nothing little fish worm," says Gen. Finley, "about the size of a darning needle, instead of allowing itself to be served as food for the birds or used as bait for the boys for fishing, for which it was created by an All Wise Providence, got ambitious to cut a figure in the world and therefore left its humble abiding place and wended its way up town, landing finally in the water meter of Dora B. Gates, the alleged proprietor and owner of the Crawford County Hospital, and in forcing its worthless carcass into the water motor of Mrs. Dora B. Gates, it caused the valve of her water motor to leak and thereby caused her water to waste, and made her water meter register more water than she value of $8.52, in the month of April, 1914, when, as she says, only $2.50 worth of water was used, and she asks the court in said case to compel the plaintiff to accept $2.50 for the month of April, 1914, and to enjoin the defendant from shutting off her water, on ascount of her refusal to pay $8.52, caused as she says by the little fish worm monkeying with her water meter."

The defendant, the Bucyrus Development Company, filed its answer in which it contended, according to Gen. Finley, "that it was not its fish worm that did the mischief; that it neither owned nor operated the fish worm, nor did it own, operate or maintain plaintiff's water motor or pumping system, and if a little fish worm got into her water system, and caused her water to waste, and the meter to register more than was used, it was through no fault of it, and without its knowledge."

And so this miserable little fish worm, according to our contemporary, "has got these parties at loggerheads, and has set the court and lawyers in an uproar all because it had to creep up the back way, like a thief in the night, and poke its worthless nose into Mrs. Dora B. Gates' water system, and cause her water to waste and the meter to register too much water."

General Finley, finally aroused to a high pitch of indignation against the particular fish worm that caused all this trouble, lapses into versification the result of which he himself admits will go down to posterity as "a new chapter in Mother Goose's Melodies." Here is the coming world famous addendum to the Mother Goose epic:

"This is the worm all tangled and torn
That came in the water all forlorn,
That turned the motor, that fed the meter
That lay in the Hospital Gates built.

"These are the parties that went to law
And got in a tangle and helova jaw,
About the worm all tangled and torn
That came in the water all forlorn
That turned the motor, that fed the meter
That lay in the Hospital Gates built.

"These are the lawyers all chipper and wise,
Who tried the case with blood in their eyes,
In behalf of the parties who went to law,
And got in a tangle and helova jaw
About the worm all tangled and torn
That came in the water all forlorn,
That turned the motor, that fed the meter
That lay in the Hospital Gates built.

"This is the court serene and sedate,
Who tried the worm and settled its fate
And settled the lawyers, all chipper and wise,
Who tried the case with blood in their eyes,
In behalf of the parties who went to law
And got in a tangle and helova jaw
About the worm all tangled and torn

HUMOR OF THE LAW.

Judge Stephen C. Greene, at a dinner in Charleston, was defending a harsh sentence.

"I am a conservative," said Judge Green, "and I believe that it is better for law and order that sentences should err on the side of harshness rather than on the side of leniency.

"Look at nature, the great judge of us all. Was there ever a harsher, severer judge than nature, who sentenced each and every one of us to hard labor for life?"

Ephum Johnson was up before the judge on a cruelty to animals charge.

"'Deed Ah wasn't abusi' dat mule, jedge," the old man demurred.

"Did you not strike it repeatedly with a club?"

"Yessah."

"And do you not know that you can accomplish more with animals by speaking to them?"

"Yessah; but dis critter am diff'nt. He am so deef he can't heah me when Ah speaks to him in de usual way, so Ah has to communicate wid him in de sign language."

Every now and then Judge Mulqueen makes a pertinent comment on the advisability of those having eyes using them to see with, says the New York correspondent of the Cincinnati Times-Star. He especially directs his attention toward the magistrates on the city bench, most of whom are so bound by the thongs of custom that with all the will in the world to deal justly they often make serious mistakes. "I had a colored woman before me to-day as a complaining witness," said Judge Mulqueen. "She had a man held for trial by a city magistrate on the charge that he had attacked her with a pair of scissors. 'He mout' near gouge mah eye out, Jedge,' she said to me. 'Jes' come at me lak a lion, he did, a-roarin', suh. He poke me in de face wiv dem scissors, Jedge, not once, but four or five times. He jes' cut up mah face lak if it was a yahd of ribbon, Jedge. The magistrate what held him to dis heah court says he nevah did hear tell of no more dang'rous man.'

"Then I looked her over. She had a wide, smooth, yellow face that didn't have a mark on it. I told her to repeat her story, and she went all over it again, telling how the man had slashed her face with that pair of scissors.

"'But madam,' I said, 'there isn't a mark on face.'

WEEKLY DIGEST.

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1. **Action**—Demurrer.—A petition declaring on a purchaser's promise to pay in cash, instead of in stock, if within a certain time a cement plant had not been established, held not demurrable for misjoinder, though it alleged bad faith and sought a receivership.—Delgarno v. Middle West Portland Cement Co., Kan., 145 Pac. 823.

2. **Agriculture** — Negligence. — Defendant, which conducted an agricultural fair, held liable for the death of a boy killed through the negligent handling of a rifle by one in charge of a shooting gallery licensed by defendant.—Graffam v. Saco Grange, Patrons of Husbandry, No. 53, Me., 92 Atl. 649.

3. **Alteration of Instruments**—Authorized Insertion.—An insertion of a clause in a mortgage after execution, made by the mortgagor's agent before delivery while having control of the mortgage for delivery, is not an "alteration of an instrument."—Johnson v. Northern Minnesota Land & Investment Co., Iowa, 150 N. W. 596.

4.——Mortgage.—The purchaser of real estate sold subject to a mortgage cannot defeat foreclosure because of material alterations in the note and mortgage, not prejudicial to him.—Dieball v. Wilhite, Kan., 145 Pac. 854.

tutional by the United States Supreme Court, its reversal of the judgment only operated to vacate the judgment for double damages, and the judgment for costs on the state appeal, leaving the judgment for single damages intact.—Kennedy v. Chicago, M. & St. P. Ry. Co., S. D., 149 N. W. 726.

7. **Assault and Battery**—Withdrawal from Fight.—The rule that, where the victim in good faith withdraws from a mutual combat and is afterwards assaulted, he may recover damages, does not apply where the assaulted party strikes his assailant immediately on escaping from his attack.—Eisentraut v. Madden, Neb., 150 N. W. 627.

8. **Audita Querela**—Vacation of Order.—Where service of attachment on real estate belonging to nonresident defendants was not made as required by statute and judgment was rendered, defendants were entitled to have it vacated on audita querela, though they might also have another remedy.—Deal v. Powell, Vt., 92 Atl. 648.

9. **Bailment**—Liens.—A lien given by Gen. St. 190, § 4808, to a mechanic, artisan, or tradesman, is an extension of the common-law lien; and a stipulation which postpones payment for labor and expense after completion and delivery does not necessarily destroy the lien.—Olson v. Orr, Kan., 145 Pac. 900.

10. **Bankruptcy**—Discharge.—Where W purchased land as trustee for a voluntary association and thereafter as trustee conveyed the property to himself in person, W's discharge in bankruptcy held not to relieve the property purchased from a vendor's lien retained in the deed to the association.—White v. Hartman, Colo., 145 Pac. 716.

11.——Discretion of Trustee.—Where a trustee refuses to accept property which he deems will be a burden, it reverts to the bankrupt and the remedy of creditors is to apply to the bankruptcy court to compel the trustee to accept the property.—People's Nat. Bank of Independence v. Maxson, Iowa, 150 N. W. 601.

12.——Intent to Deceive.—The word "false," as used in Bankr. Act, § 14b (3), means false coupled with an intention to deceive, "intentionally untrue," and was not satisfied by a financial statement made by the bankrupt while away from home, omitting $4,300 of his debts and also assets of an equal or greater amount. —Franklin v. Monning Dry Goods Co., U. S. C. C. A., 217 Fed. 929.

13.——Pleading.—A judgment creditor having the burden of showing that his claim is not barred by discharge in bankruptcy, the creditor's declaration, from which the nature of the claim appears, should be given the construction most favorable to the bankrupt.—In re Grout, Vt., 92 Atl. 646.

14.——Preference.—The admission in evidence, in an action by a trustee in bankruptcy to recover an alleged preferential payment, of the inventory and appraisement made in the bankruptcy proceeding, held not prejudicial to defendant, where the testimony of a witness also introduced by plaintiff placed a much higher valuation on the property than that shown by the appraisement.—Bergdoll v. Harrigan, U. S. C. C. A., 217 Fed. 943.

15. **Banks and Banking**—Rescission.—Where a stockholder in an insolvent bank relies upon a right to rescind her purchase of shares to escape her statutory liability to creditors, she must affirmatively show equities in her favor. Farmers' State Bank of Mobridge v. Empey, S. D., 150 N. W. 936.

16. **Bills and Notes**—Alternative Payee.—Where a note was payable to the lender, if living at a certain date, or, on his death, to [illegible]

modation indorsers, of security given by the maker, releases them, if they insist thereon, yet, where they take up the old note with their individual note, they waive their right, and are liable on the new note.—German Nat. Bank v. Barber, Wis., 149 N. W. 767.

19. **Bonds**—Defenses.—It is no defense to an action on a bond that there is another bond outstanding, executed by the same persons for the same purpose and containing the same conditions.—White Sewing Mach. Co. v. Bradley, Ariz., 145 Pac. 725.

20. **Brokers**—Defense to Action.—Owner cannot defeat an action for a broker's commission by a claim that the contract with the proposed purchaser was unsatisfactory, where his only excuse for not accepting it was that he had already sold to another.—Paulsen v. Rourke, Colo., 145 Pac. 711.

21.——Marketable Title.—A marketable title in fee simple to property desired to be purchased by a principal is necessary to sustain a broker's claim for commissions when the purchaser has not entered into a binding contract to purchase.—Kinney v. Eckenberger, Ore., 145 Pac. 665.

22. **Cancellation of Instruments**—Modification.—Where the court decreed cancellation unless defendant made payments to plaintiff's attorney, it was not error to modify the judgment by authorizing such payments to be made to the clerk of the court for plaintiff's benefit.—Barnes v. Hulet, N. D., 150 N. W. 562.

23. **Carriers of Goods**—Carmack Amendment.—Remedy given by Carmack Amendment is concurrent with any other existing federal remedy, and does not prevent an action against a terminal carrier of an interstate shipment for loss occurring on its line.—Bichmeier v. Minneapolis, St. P. & S. S. M. Ry. Co., Wis., 150 N. W. 508.

24.——Excuse for Non-Performance. — The failure of a carrier to promptly transport a shipment held not excused, because consignee's tracks were filled with cars containing another shipment, which had been properly rejected.—Berger-Crittenden Co. v. Chicago, M. & St. P. Ry. Co., Wis., 150 N. W. 496.

25. **Carriers of Live Stock**—Authority of Agent.—Where a consignor of cattle agreed to accompany them, that the conductor told him, after part of the trip had been made, that it would be all right if he did not accompany the cattle the rest of the distance will not release the consignor without proof that the conductor was authorized to annul the contract.—Mix v. Chicago, M. & St. P. Ry. Co., S. D., 149 N. W. 727.

26. **Carriers of Passengers**—Baggage.—The fare of a passenger includes transportation for baggage, but ordinarily the baggage must be transported by the same train as the owner and called for within a reasonable time after arrival.—Denver & R. G. R. Co. v. Doyle, Colo., 145 Pac. 688.

27.——Safety.—A carrier is bound to exercise the highest degree of care for the safety of its passengers reasonably to be expected from human foresight and vigilance.—Hewitt v. Southern Wisconsin Ry. Co., Wis., 150 N. W. 502.

28.——Special Train.—One contracting and paying for a special train is entitled to the proper service of the train and the carrier may not, without breaching the contract, move the train to another point or attach to it other cars.—Burrus v. Nevada-California-Oregon Ry., Nev., 145 Pac. 926.

29.——Withdrawal of Evidence.—In a street car passenger's action for personal injury from collision with a runaway team, violation of ordinance as to sounding of a gong or bell 100 feet from crossings held properly withdrawn from the jury.—Anthony v. Connecticut Co., Conn., 92 Atl. 672.

30.——within the Federal Employers' Liability Act.—Graber v. Duluth, S. S. & A. Ry. Co., Wis., 150 N. W. 489.

32.——Inspection Law.—The Oil Inspection Law is violative of the commerce clause of the Federal Constitution in so far as the fees provided for exceed the reasonable necessary cost of inspection, if in fact it exceeds such cost.—Bartels Northern Oil Co. v. Jackman, N. D., 150 N. W. 576.

33. **Common Carrier**—Stockyards Company.—A stockyards corporation making a charge for each car moved over its track in accordance with a tariff filed was "engaged in business as a common carrier."—State v. Kansas City Stockyards Co. of Missouri, Kan., 145 Pac. 831.

34. **Constitutional Law**—Raising Question.—The constitutionality of Laws 1909, c. 296, § 9, construed to prohibit the sale of yellow oleomargarine, is not raised in the absence of proof that yellow is the natural color of oleomargarine.—State v. Manley, S. D., 150 N. W. 291.

35.——Workmen's Compensation Act.—The Workmen's Compensation Act held not to impair the obligation of contracts in violation of the state and federal Constitutions.—State v. District Court of Meeker County, Minn., 150 N. W. 623.

36. **Contracts**—Assumption of Debt.—A contract between defendant and B, by which defendant agreed to assume B's debt to plaintiff held conditional, so that on B's failure to perform defendant did not become liable to plaintiff.—Gimbel Bros. v. McConnell, Wis., 150 N. W. 495.

37.——Restraint of Trade.—Provision in a salesman's contract that he would not during contract or within a year thereafter engage in the business of selling teas "or other merchandise," held not invalid as in restraint of trade.—Jewel Tea Co. v. Watkins, Colo., 145 Pac. 719.

38. **Corporations**—Ouster.—Where a foreign corporation, though authorized merely to operate stockyards, engages in business as a common carrier, it will be ousted on proper application.—State v. Kansas City Stockyards Co. of Missouri, Kan., 145 Pac. 831.

39.—Transfer of Stock.—Indorsement on certificate construed as a requirement that before the stock was transferred upon books the officers should be able to certify that the stock had been fully paid for by the payment of the note.—Herron v. Gear, Cal., 145 Pac. 731.

40.——Unissued Stock.—The unissued stock of a corporation forms its capital at par, and the corporation alone may dispose of it according to law.—Bivens v. Hull, Colo., 145 Pac. 694.

41. **Counties**—Invalidation of Bonds.—That one county commissioner moved into the district of another commissioner held not to invalidate bonds voted at a special election ordered by the county board and held under a notice complying with Rev. St. 1913, § 956.—Horton v. Howard, Neb., 150 N. W. 633.

42. **Courts**—Reversal Without Remand.—The circuit court may reverse the judgment of the civil court on the record and dismiss the complaint; it not being required to order a new trial by Civil Court Act, § 28.—Pietsch v. McCarthy, Wis., 150 N. W. 482.

43. **Criminal Evidence**—Footprints. — Footprints corresponding with those made by shoes probably worn by accused, or tracks of horses probably driven by him, are admissible as identifying evidence.—State v. Cole, Kan., 145 Pac. 842.

44. **Criminal Law**—Arraignment.—Failure to formally arraign a defendant is not fatal, where he was present with counsel and testified at his trial, and did not object to want of arraignment.—State v. Klasner, N. M., 145 Pac.

47.——Waiver.—Objections that a justice set a prosecution for cruelty to animals more than 10 days off and issued the warrant before the complaint was filed were of form and procedure only which were waived by defendant's appeal to the county court.—McCausland v. People, Colo., 145 Pac. 685.

48. **Damages**—Destruction of Trees.—A landowner is entitled to damages from the destruction of fruit trees by fire, regardless of whether his land can be most profitably used for orchard purposes.—Barker v. Missouri Pac. Ry. Co., Kan., 145 Pac. 829.

49.——Diminution in Value.—The owner of an animal injured may recover its diminished value after partial cure, together with expense of treatment and value of its use while under treatment.—Raski v. Great Northern Ry. Co., Minn., 150 N. W. 618.

50.——Excessive.—A recovery of $5,026 for permanent injury to an arm and conseqential loss of time and expenses to a teamster 24 years old held not excessive.—Krum v. Sullivan & Schaberg Transfer & Fuel Co., Neb., 150 N. W. 640.

51.——Loss of Crops.—The measure of damages for loss of growing crop is its value at the time of loss, ascertained by its reasonable value at the time, or its market value at maturity, less cost of production and marketing.—Berg v. Yakima Valley Canal Co., Wash., 145 Pac. 619.

52. **Death**—Passion and Prejudice.—A verdict of $10,000 for the death of a married woman 52 years old held not so excessive as to justify setting aside as the result of passion or prejudice.—Craig v. Chicago, St. P., M. & O. Ry. Co., Neb., 150 N. W. 648.

53.——Unexplained Absence. — Unexplained absence of insured for more than seven years held to place on the insurer the burden of showing that he was yet alive.—Rosencrans v. Modern Woodmen of America, Neb., 150 N. W. 630.

54. **Deeds**—Reservation.—While there is a distinction between a reservation in a deed and an exception, yet what is called a reservation will often be given effect as an exception to carry out the intention of the parties.—Plistil v. Kaspar, Iowa, 150 N. W. 584.

55.——Rule in Shelley's Case.—The rule in Shelley's Case, except, under Gen. St. 1909, § 9829, as applied to wills, is part of the common law adopted by section 9850, and under a deed to a grantee for life, at his death the title to vest in his heirs, he can convey the fee.—Kirby v. Broaddus, Kan., 145 Pac. 875.

56. **Divorce**—Change of Residence.—The fact that the motive for an actual change of residence was to procure a divorce does not affect the good faith of the change.—Gildersleeve v. Gildersleeve, Conn., 92 Atl. 684.

57.——Cruel and Inhuman Treatment.—A divorce should not be granted for cruel and inhuman treatment consisting of harsh language, if brought about by the complaining party's acts, and not out of all proportion to such acts. —Hopkins v. Hopkins, S. D., 150 N. W. 293.

58.——Desertion.—To warrant a divorce for desertion there must have been a voluntary abandonment without consent, justification, or intention to return, continuing for a year.—Maloney v. Maloney, Wash., 145 Pac. 631.

59.——Right to Visit Children.—An order that a divorced husband may not see his children oftener than once in six months, and then in the presence of a third person named by the wife, is a deprivation of the right to visit, and is unsustainable, except on the clearest proof.—Schlarb v. Schlarb, Iowa, 150 N. W. 593.

60. **Dower**—Antenuptial Contract.—An antenuptial contract executed by a prospective wife alone is not within St. 1911, § 2170, and an election within the time prescribed by section 2172, as it formerly stood or as modified by Laws, 1913, c. 394, is inapplicable.—Bibelhausen v. Bibelhausen, Wis., 150 N. W. 516.

ments of benefits and expenses.—State v. Pound, S. D., 150 N. W 287.

62. **Ejectment**—Estoppel.—Where defendant in ejectment has paid off mortgages placed on the property by plaintiff, held that plaintiff could not oust him from possession until she had accounted to him for the amount thus paid.—New v. Smith, Kan., 145 Pac. 880.

63. **Election of Remedies**—Power of Court.—A court cannot, over the objections of both parties, require a purchaser, who elected to sue for the recission of the contract, for the vendor's breach, to change his cause of action to one for damages.—Cheney v. Bierkamp, Colo., 145 Pac. 691.

64. **Escrows**—Offer of Sale.—Where a deed is deposited in escrow without there being a preexisting contract of sale, the negotiation is a mere "offer of sale," and the deed may be withdrawn.—Seifert v. Lanz, N. D., 150 N. W. 568.

65. **Estoppel**—Building Restrictions.—Where a corporation sold lots in a city addition subject to building restrictions, such restrictions were not covenants personal to the corporation, but it was bound by estoppel as well as other purchasers with notice.—Duester v. Alvin, Ore., 145 Pac. 660.

66. **Evidence**—Medical Books.—Before medical books can be introduced to refute a medical expert's testimony, the witness' attention must have been called to such books, and he must have based his testimony thereon.—State v. Brunette, N. D., 150 N. W. 271.

67. **Fraudulent Conveyances** — Notice. — Where the owner of notes desired to dispose of them to defraud creditors, and plaintiff, knowing of that intent, or having knowledge of circumstances sufficient to put her on inquiry, purchased the notes, she takes them subject to the right of creditors.—Cole v. Reily, S. D., 150 N. W. 299.

68. **Highways**—Negligence.—That person injured by falling into excavation near footpath knew of the excavation and of the lack of a railing, and might have taken a different path, held not conclusive that she was negligent.—Smith v. Town of Milford, Conn., 92 Atl. 675.

69.——Obstruction.—That plaintiff passes over a highway more frequently than others does not sustain special damages beyond that of the general public, entitling him to enjoin its obstruction.—Borton v. Mangus, Kan., 145 Pac. 835.

70.——Public Policy.—An order for the relocation of a highway is not void as against public policy, because it requires the petitioners therefor to pay a part of the assessed damages.—Lockard v. Hartley, Kan., 145 Pac. 900.

71. **Homicide**—Evidence.—In a prosecution for killing, by stabbing, evidence that defendant had had in his possession a knife similar to the one found near the scene of the stabbing was admissible.—State v. Salgado, Nev., 145 Pac. 919.

72. **Homestead**—Liens.—A homestead filing is superior to a general lien on the real estate selected, but such filing does not defeat a specific lien.—White v. Hartman, Colo., 145 Pac. 716.

73. **Husband and Wife**—Joinder in Deed.—Where a husband executes a contract to sell land in which his wife, once a resident, does not join, a later deed by both transfers her interest free of any claim of the original purchaser, though the grantee knew of the prior contract.—Williams v. Wessels, Kan., 145 Pac. 856.

74.——Title.—Where a husband put property into the hands of his wife in Missouri so as to give her no title thereto, on their removal to California the property remained his unless parted with by gift.—Brunner v. Title Ins. & Trust Co., Cal., 145 Pac. 741.

75. **Infants**—Juvenile Court.—The object of the juvenile court act is not punishment, but the removal of juvenile delinquents from temp-

joining the original grantor or its immediate or intermediate grantees, and without averring that they had been especially injured or that the original grantor refused to become a party.—Duester v. Alvin, Ore., 145 Pac. 660.

77.——Prosecutions.—Where city authorities had arrested complainant's agent several times, for failure to take out licenses under local ordinance to do an interstate business, and threatened to continue the same, an injunction was properly granted against further prosecutions; those pending being expressly exempted from the decree.—City of Lee's Summit v. Jewel Tea Co., U. S. C. C. A., 217 Fed. 965.

78. **Insurance**—Change of Interest.—Where insured conveyed to a third person, who immediately reconveyed, insured only wishing to apparently divest herself of title, a fire policy, though providing a change of insured's interest should avoid it, was not forfeited.—Willey v. London & Lancashire Fire Insurance Co., Conn., 92 Atl. 678.

79.——Waiver.—A receipt containing a mistaken recital that an insurance premium was paid for August, instead of July, held not a waiver, new agreement, or extension of time of payment.—Gardner v. Inter-Ocean Life & Casualty Co. of Springfield, Ill., Kan., 145 Pac. 844.

80. **Judgment**—Default.—Refusal to open a default judgment held an abuse of discretion, where the defendant showed a reasonable excuse for his absence, and present a good defense, and no substantial prejudice would result from sustaining the motion.—Hodges v. Alexander, Okla., 145 Pac. 809.

81.——Res Judicata.—Tested by whether the same evidence would have maintained both actions, judgment of dismissal in action against a city on express contract held not a bar to the plaintiff's subsequent action on a quantum meruit.—Mallory v. City of Olympia, Wash., 145 Pac. 627.

82.——Stay.—Judgment may not be had, notwithstanding a provision for its stay, on a debt before the transpiring of an event, till the happening of which, under the contract under which the debt arose, the amount is not to become due.—Mondioli & Stewart v. American Bldg. Co., Wash., 145 Pac. 577.

83. **Larceny**—Indictment.—Where the indictment states that the owner of the stolen animal is unknown, and there is evidence that the grand jury knew, or should have known, the owner's name, the burden is on the state to show that it did not know such name.—State v. Klasner, N. M., 145 Pac. 679.

84. **Libel and Slander**—Privilege.—False statements by a guardian of an insane ward to his wards' relatives, imputing dishonesty and crime to a person making claim against the wards' estate, are not absolutely privileged.—Marney v. Joseph, Kan., 145 Pac. 822.

85. **Life Estates** — Remaindermen.— Where grantees remained in actual, open, and adverse possession, claiming title, until more than two years after the youngest remainderman became of age, and made improvements, held that any defense of the remaindermen to their suit to quiet title was barred by limitations.—Knickerbocker v. Bangs, Kan., 145 Pac. 820.

86. **Mandamus**— Practice.—Where the district court, without jurisdiction and without notice, issues a mandatory injunction depriving parties of possession of property, and then reserves final judgment indefinitely, such parties may resort to mandamus in the Supreme Court.—Bishop v. Fischer, Kan., 145 Pac. 890.

87. **Master and Servant**—Assumption of Risk.—Employee held not to assume risk of injury from employer's violation of statute respecting

89.——Contributory Negligence.—A railroad employee's failure to discover that the tongue in the knuckle on a car was broken was not contributory negligence, where the tongue was broken on the previous day and the inspector failed to detect it.—Knock v. Tonopah & G. R. Co., Nev., 145 Pac. 939.

90.——Federal Employers' Liability Act.—Under the federal Employers' Liability Act, held that a railroad company was liable for its conductor's negligence in the management of the engine.—Martin v. Atchison, T. & S. F. Ry. Co., Kan., 145 Pac. 849.

91.——Safe Appliance.—A complaint and promise have the same effect on the employer's liability, whether the unsafe condition results from an appliance being out of order or from its want of fitness.—Sappenfield v. National Zinc Co., Kan., 145 Pac. 862.

92.——Safe Place.—An employee may assume that he can work in safety, and that the employer has furnished him with a reasonably safe place to work.—Janilus v. International Paper Co., Me., 92 Atl. 653.

93.——Scope of Employment.—Where there was no prohibiting order, held that the conductor had authority to order a brakeman to act as fireman, and, in obeying such order, the brakeman was acting within the scope of his employment.—Martin v. Atchison, T. & S. F. Ry. Co., Kan., 145 Pac. 849.

94. **Mechanics' Liens**—Material Man.—Where contract for the sale of land required the erection of buildings for which a mechanic's lien claimant furnished materials, the vendor's interest was subject to a lien therefor.—Miller v. Davis, Colo., 145 Pac. 714.

95. **Monopolies**—Contracts.—A contract, whereby defendant agreed to sell plaintiff's patterns and not to sell those of any other make, does not violate Laws 190, c. 224, prohibiting monopolies.—Sullivan v. Rime, S. D., 150 N. W. 556.

96. **Mortgages**—Oral Agreement.—Where a mortgagee orally agreed to pay a street assessment and premiums on certain policies as a part of the consideration for a mortgage, he could not declare the whole debt due under an option in the mortgage and foreclose because of the mortgagor's failure to pay such items.—Harbican v. Skinner, Wash., 145 Pac. 582.

97. **Municipal Corporations**—Waiver.—That a city ordered a contractor to complete a sewage system shortly before and after the time stipulated by the contract for the completion thereof did not constitute a waiver of the city's right to damages for delay.—Egolf v. City of York, Pa., 92 Atl. 695.

98. **Navigable Waters**—Flood Waters.—Low lands along a navigable stream, having become urban property, owe no servitude to other adjoining lands to carry off, without interference, extraordinary flood waters which leave the main channel and flow over the bottom lands.—Smeltzer v. Borough of Ford City, Pa., 92 Atl. 702.

99. **Negligence**—Attractive Nuisance.—An unguarded canal flowing through a city held not an attractive nuisance rendering the company owning the same liable for the death of a child under the doctrine of the turntable cases.—Somerfield v. Land & Power Co., Kan., 145 Pac. 893.

100.——Reliance on Condition.—Plaintiff may show injury from defendant's want of care set out in the petition concurring with a condition not therein referred to, where he does not rely on such condition as constituting negligence.—Sappenfield v. National Zinc Co., Kan., 145 Pac. 862.

101. **Obstructing Justice**—Breach of Peace.—

have made of the old wall prior to its removal.—Stevenson v. Mellor, Pa., 92 Atl. 713.

103. **Quieting Title**—Law of Forum.—The law of the forum and of the situs of the land control the method and procedure of canceling contracts in an action to determine adverse claims, though the contracts were executed in a foreign state without stipulating for performance within the state of the situs.—Wilson v. Kryger, N. D., 149 N. W. 721.

104. **Shipping**—Exemption from Liability.—A negligence clause exempting a shipowner from liability for damages to a shipment from "any act, neglect, or default of pilot, master, mariner," etc., is a good defense to an action in the United States for damages to cargo from negligence in handling, where the destination is not the United States or any country under whose laws such clauses are proven to be invalid.—The Miguel di Larrinaga, U. S. D. C., 217 Fed. 678.

105.——Seaworthiness.—A shipowner warrants his ship to be seaworthy and fit for the cargo and particular service for which she is engaged at the commencement of the voyage, and such warranty is an absolute undertaking, and covers latent defects as well as those which are discernible by inspection.—Benner Line v. Pendleton, U. S. C. C. A., 217 Fed. 497.

106. **Specific Performance**—Definiteness.—A contract whereby defendant agreed to purchase a farm and convey it to plaintiff, his son-in-law, when a substantial part of the price was paid, giving the plaintiff such time as he required for the payment, held sufficiently definite to be specifically enforced.—Dingman v. Hillberry, Wis., 149 N. W. 761.

107.——Evidence.—In an action for specific performance of a contract to convey a tract of land, "less four village lots" which "are an addition to the village," in which defendant pleaded mistake, evidence held to show that the parties intended to except the four blocks which constituted the addition, and not merely four lots.—Morrow v. McWilliams, Wis., 149 N. W. 696.

108.——Undisclosed Principal.—Specific performance may be enforced against an undisclosed principal when his duly authorized agent, in his own name, within the scope of his agency, contracts concerning the sale or purchase of land.—Forgey v. Gilbirds, Mo., 170 S. W. 1135.

109.——Waiver.—Where a purchaser of a hotel and lots on which it was situated negotiated for a sale of the property to a third person without knowing the deficiency of one-seventh of an acre in the quantity of the land represented by the vendor as 1½ acres, he did not thereby waive the misrepresentation as to quantity, but could rely thereon to defeat specific performance.—Taliaferro v. Boyd, Ark., 171 S. W. 105.

110. **Subrogation**—Voluntary Payment.—One who, to protect his interest under a deed from a surviving wife of an owner of land incumbered by a prior mortgage, redeemed from a foreclosure, held subrogated to the rights of the mortgagee.—Bailly v. Farmers' State Bank of Sisseton, S. D., 150 N. W. 942.

111. **Telegraphs and Telephones**—Free Delivery Limits.—Under a writen contract for the delivery of telegrams by a mesenger company as modified, held that the telegraph company must pay for deliveries outside the free delivery limits.—City Messenger & Delivery Co. v. Postal Telegraph Co., Ore., 145 Pac. 657.

112. **Tender**—Waiver.—Where a tender of money was rejected on the sole ground that it was less than the amount claimed to be due, there was a waiver as to the kind of money tendered.—May v. Findley, Ala., 66 So. 463.

and a tax of 5 per cent and no more may be collected on property so passing.—McKeown v. Brown, Iowa, 149 N. W. 593.

115. **Trover and Conversion**—Demand.—One who takes possession of chattels of another, even under a bona fide belief of right, is guilty of a conversion thereof, so that no demand is necessary before suing.—Meador v. Evans, Ala., 66 So. 446.

116. **Trusts**—Resulting Trust.—That the principal had paid none of the purchase money did not preclude him from establishing a resulting trust in a contract to purchase land taken by the agent in his own name in violation of his fiduciary duty.—Havner Land Co. v. MacGregor, Iowa, 149 N. W. 617.

117.——Resulting Trust.—One who by agreement with the heirs of the mortgagor purchased land at foreclosure, taking the deed in his own name as security for money advanced for the purchase, held a trustee under a resulting trust.—Comfort v. Winters, Miss., 66 So. 532.

118. **Venue**—Joinder.—Where substantial equitable relief is prayed against a defendant whose domicile is in the county, and jurisdiction is acquired as to him, another necessary party may be joined, though he resides in another county.—Crawford v. Wilson, Ga., 83 S. E. 667.

119. **Vendor and Purchaser**—Presumption.—Where a vendor contracted to receive bonds of a corporation to be formed in part payment for the land, but the contract was silent as to the amount of the bond issue, it would be presumed that it was to be in such amount as would make their real value equal to their par value.—Campbell v. Goldthwaite, Ala., 66 So. 488.

120.——Rescission.—A representation by agents of a vendor to a purchaser that the vendor and others would construct improvements in the neighborhood which would enhance the value of the property, was not ground for rescission.—Manns v. Boston Harbor R., S. S. & Land Co., Wash., 144 Pac. 535.

121. **Waters and Water Courses**—Diversion.—Where a complaint against a railroad company for diverting surface water onto complainant's land by the stoppage of a sewer and the opening of another did not negative the fact that in failing to keep its sewers open, it was sufficient to sustain a recovery.—Atlantic Coast Line R. Co. v. Woolfolk, Ala., 66 So. 464.
the injury was caused by the fault of a city

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EMPLOYERS' LIABILITY INSURANCE AS OPPOSED TO PUBLIC POLICY.

There is a very interesting review by Kentucky Court of Appeals of the question whether an employer's liability policy could be construed as or not solely for the benefit of assured or could also inure to the benefit of one to whom the assured should become liable in an accident covered thereby. Fidelity & Casualty Co. v. Martin, 173 S. W. 307.

The Kentucky court follows, as conceded by a dissenting minority of two of the five members of the court, the greater weight of authority on this subject, to the effect that the usual policy as written by casualty companies insures the holder of it not against liability, but solely against loss, and that it is for the exclusive benefit of the assured.

This Journal has frequently alluded to these policies as being in its opinion opposed in their strict construction to sound public policy, exemplified in the rule against maintenance and champerty. Upon this theory it expressed its hearty agreement with ruling by Minnesota Supreme Court in Patterson v. Adan, 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184. See 76 Cent. L. J. 73; 73 id. 147.

We take great pleasure, therefore, in referring to and quoting from the dissenting opinion in the Martin case, supra, in the construction herein submitted that there should be legislation on this subject.

The Martin case, like the Patterson case, showed a judgment against an insolvent, where the insurance company controlled the defense and in so doing interfered with any settlement or attempted

The majority in the Martin case merely construes the terms of the policy as if no one else were interested therein or interfered with thereby and none of the numerous cases cited and quoted from in its support appear to have regarded the matter from any other standpoint.

It is said in the Martin case, quoting from the majority opinion, that: "It is complained by appellee (plaintiff in judgment) that to construe the contract of insurance as insisted by appellant would ignore the numerous equities that exist in behalf of appellee and subject him to the hardship of being deprived of compensation for his injuries. It is sufficient response to say that we can do no more than determine the rights of the parties under the contract of insurance."

But the Patterson case said: "The company assumed the defense and has carried on the litigation to the bitter end, even after defendant left this jurisdiction. The assured retained no voice or interest in the litigation. The company substituted its interests and its judgment for that of assured in the action. By so doing, it assumed a relation to this plaintiff, and to every plaintiff, where under its policy it steps into a suit, which must be considered in construing the contract. * * * The policy here should be so interpreted, if possible, that its provisions do not run contrary to law, and that result is reached by holding that the undertaking to defend means something more than carrying on litigation in court." Even then, we think, the company should not be allowed, according to the well-settled objections to maintenance, to contract to carry on litigation in which it is otherwise not interested, if a plaintiff, at least, should care to object. He surely would object, unless the company agreed to stand in the breach as to lia-

The dissenting opinion in the Martin case views such policies, where they only inure to the benefit of assured, as being in the nature of "wager contracts," because if in a master and servant case it is not for the benefit of the employe, as to whose life the employer has no insurable interest, he gambles upon being made safe in the event of his death from accident in the course of employment.

The dissenting opinion also thinks the contract offends policy as being barratry, maintenance and champerty and: "It certainly is not conducive to safety of employes, because a reckless employer, feeling secure in the indemnity, will be careless and indifferent to the safety of places, tools and appliances where and with which his servants work."

But the opinion observes that these things have been thought counterbalanced by the protection such insurance gives to industries "against sudden and unexpected liability." In other words, safety of business is weighed against safety of life and limb and it pulls down the beam on its side, with no benefit to him whose safety of life or limb is lessened thereby.

The opinion says also that this benefit to industry is taken away when the policy is construed as one for liability only and not for actual loss. "It leaves no protection to industry against unexpected liability. It, in fact, makes insolvency or bankruptcy more probable. The contract, as construed by the company and upheld by the court, means that the employer voids it if he pays the loss, and, if he does not pay it, there is no liabil-

loss, and says: "It is unreasonable to presume that it was intended that after the assured had surrendered all control of the litigation to insurer, and after the insurer had exercised absolute control of the defense until judgment, then the assured must convert his assets into money, if he can, or be driven to the brink of bankruptcy or insolvency to pay a judgment in order that the company may be compelled thereafter to pay the insured."

The dissenting opinion further suggests that "the right construction is to recognize an insurable and enforceable interest in the party or class who may have such a claim against the insured as amounts to a liability which may be imposed by law."

It cannot be denied that these policies do have a tendency towards endangering the lives of others than the assured. Nor can it be denied that, if the insurance aids in protection of industry "against sudden and heavy liability arising from accident to employes," there ought to be some way of making it promptly available for the benefit of employes, or their families, maimed or killed by accident. The business in which they are injured or lose their lives pays the premiums for such insurance and if the policies are paid upon a loss something in the nature of a trust should attach to the proceeds. To pay to an individual a loss that arises in his business out of accident and allow him to put it beyond the reach of the employe who suffers accident or death, certainly enables the individual to gamble and reap profit from such accident or death. If he is solvent, regulation of distribution can harm him in no way.

NOTES OF IMPORTANT DECISIONS

POLICE POWER—RIGHT OF PUBLIC SERVICE COMMISSION TO INVALIDATE CONTRACTS PREVIOUSLY MADE.—The Washington Supreme Court recognizes the rule. rule, often held by itself as well as other courts, that contracts within the police power are subject to termination as being void under subsequent legislation. State v. Public Service Commission, 145 Pac. 215.

The case of the L. & N. Ry. Co. v. Mottley, 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671. is the most prominent of the cases which, by analogy, sustains this exercise of power.

The Washington court, however, appears to us to apply the principle very gingerly in the above stated case to a contract by a water company with certain mill companies entered into prior to legislation vesting power in the Public Service Commission to fix rates.

The question turned upon a section of the commission act which recognized the validity of prior contracts and the rates therein scheduled with a proviso that "the commission shall have power in its discretion, to directly order that such contract or contracts shall be terminated by the company party thereto, and thereupon such contract or contracts shall be terminated by such company as and when directed by such order."

The court goes into argumentation, somewhat involved, it seems to us, in an attempt to show, that this provision being in the act, the prior contracts were neither void nor voidable, and, therefore, they could not be avoided without compensation being paid.

There is however, nothing said in the section referred to about compensation being made, but it is expressly stated that in the Commission's discretion and by special order it may assume control over such contracts the same as if the law had not provided, in the absence of such special order, that they did not come within its regulation.

The court lays stress on the fact that the proviso "shall be terminated by the company," and then says the company, though ordered by the commission, cannot do this without making compensation. But this seems to us to be sticking in the bark. It amounts to police

company in this way is merely made the medium of communication to other parties to the contract which are to be lived up to until they are notified.

The court says, "They (these contracts) were valid and binding obligations which the statute does not attempt to avoid, but expressly exempts." We think they are not absolutely exempted, but only upon condition that the commission does not make any special order with regard to them. To hold otherwise would make classification in exemption of a positive nature, when to hold as we contend makes classification of a conditional nature, within control of the Commission. It should be remembered that this section of the Commission act creates an exception and should be construed strictly and with the limitations imposed.

WITNESS—RIGHT OF COUNSEL TO COMMENT ON ACCUSED CONFINING TESTIMONY TO A SINGLE FACT.—The rule in the Federal Courts is that the cross-examination of a witness is confined to the matter about which he testifies in direct examination. In some states the right of cross-examination as to defendant in a criminal case taking the stand is unlimited. Other states have the same rule as that followed by the Federal Court.

The question in First Circuit Court of Appeals lately was presented whether where an accused testified as to a single fact and cross-examination accordingly was limited, prosecuting counsel in his argument to the jury was prevented from making unfavorable comment upon his failure to testify fully. It was ruled that there was no waiver of the constitutional right of accused to be "free from unfavorable comment on matters to which his testimony did not relate and as to which he said nothing." Myrick v. U. S., 219 Fed. 1.

Two of three judges spoke upon this, while Putnam, C. J., voted for affirmance of the case on the ground that, if it was good, the question was not properly raised on the record, and there was no material error in the charge on this point. The court charged, however, with great particularity on this point, saying the constitutional privilege could not be waived piecemeal and when defendant came upon the stand "he steps outside of the circle which the ity or the constitutional right is not much more than a shadow.

The court says the point has never been decided by U. S. Supreme Court but refers to Balliet v. U. S., 129 Fed. 689, 64 C. C. A. 201, where the holding was not direct on the point, it being held that the instruction was faulty for other reasons. Judge Sanborn, however, held that there was no waiver of any constitutional right as to things not testified about. There was no question in this case of comment unfavorable to accused.

It seems to us that waiver of the constitutional right does not depend upon a mere matter of administration in court procedure. When an accused interjects his evidence into a case he proposes for it to be considered as a fact with reference to other facts and not as an isolated fact. He has the right under rules of evidence to be free from general cross-examination but that freedom does not compel the other side to view what he says as dissociated from other facts. A privilege is something relied upon for personal defense and not to be used for an ulterior purpose. If it is fair comment to speak of inadequacy of testimony, this seems to us to involve comment on how it could have been made complete, and accused by taking the stand opens the door for the latter comment.

LIBEL AND SLANDER—VINDICATION OF THE RIGHT TO "CUSS" THE JURY.—It has been thought by a good many that the losing lawyer has something of an immemorial right to go outside and "cuss" the court, and now comes along Kentucky Court of Appeals and holds that he actually has such a right in regard to a jury which has rendered a verdict against his client. Smallwood v. York, 173 S. W. 380.

All of this, however, is to be taken with a grain of allowance, for he must not attribute to the jury "the commission of a crime involving moral turpitude for which the 'jury' might be indicted or punished." This leaves, nevertheless, large latitude in explosive utterances for the relief of a mind surcharged with grief and commendable anxiety to explain the defeat of an attorney to his once hopeful client.

While the court let the attorney off in the above case, in which one of the jury objected to his vitriolic eloquence, employed after verdict, we are somewhat grieved to see it deploring the use by the attorney of this safety valve by calling it "highly improper." Pretty they may wish to submit some oral or written remarks in free and liberal criticism—and which should not be printed—of itself. Must the loser find no balm in Gilead for his wounded spirit?

PRACTICE OF LAW BY CORPORATIONS IN NEW YORK CITY.

No bar has been more active in preventing the practice of law by laymen, including corporations, than the New York County Lawyers' Association. After three years' investigation by the committee on general affairs of this association, they have submitted to the legislature in New York an amendment to Section 280 of the penal law, which prohibits the practice of law by corporations.

The report of the Committee states that exhaustive testimony, taken with the aid of the New York County Lawyers' Association, disclosed that the practice of the law is undertaken by three classes of corporations, trust companies and title companies, insurance companies and collection agencies.

These corporations, the report maintains, not only interfere with the business of qualified lawyers, but have given rise to a new evil in the practice of law—that of intrusting weighty legal problems to young, inexperienced and underpaid attorneys, who work for the offending corporations as clerks.

The violation of the statute, the report charges, has also led in the case of collection agencies to "gross inefficiency and actual corruption." It says that "these corporations which were offending the proprieties and jeopardizing a confiding public" are able to circumvent the statute by a "joker" in the law which exempts "any corporation lawfully engaged in a business authorized by any existing statute."

The committee's report on the "joker" says that "no more complete way to kill a statute could have been devised. No corporation would object to the first part of the statute, if it could have the last part enacted."

Section 280 of the penal law says that any corporation found guilty of practicing law shall be fined not more than $5,000, and "every officer, trustee, director, agent, or employe, who directly or indirectly engages in any of the acts herein prohibited, or assists such corporation to do such prohibited acts, is guilty of a misdemeanor. The fact that any such officer, trustee, director, agent or employe shall such facts be a defense upon the trial of any of the persons mentioned herein for a violation of the provisions of this section."

The paragraph considered the "joker" in the law is as follows:

"This section shall not apply to any corporation lawfully engaged in a business authorized by the provisions of any existing statute nor to a corporation lawfully engaged in the examination and insuring of titles to real property, nor shall it prohibit a corporation from employing an attorney or attorneys in and about its own immediate affairs, or in any litigation to which it is or may be a party, nor shall it apply to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy, whose existence, organization or incorporation may be approved by the appellate division of the supreme court of the department in which the principal office of said corporation may be located."

The remedy proposed by the committee, and which, it is expected, will meet with the approval of the Bar Association, is:

That Section 280 be amended by repealing the excepting paragraph and substituting therefor the following:

"This section shall not apply to any corporation lawfully engaged in any business within the provisions of its incorporation, as to any and all matters and acts which shall arise in or from, or be incident to, the particular business which such corporation may be authorized to conduct, provided that the acts of a professional character so authorized shall be intrusted to capable attorneys at law, who shall receive the compensation paid therefor."

It is further recommended that the committee on the amendment of the law urge the said amendment before the legislature, and, that a committee be appointed to report generally upon the following question:

"What limitations by legislative enactment, if any, should be made upon the acts of corporations or persons who are not duly admitted by the courts to the practice of the law, who assume to do that which lawyers alone are held responsible and competent to do?"

The report further goes on to say:

"Taking advantage of the statute, the title, sons who might name them as executors under the will."

The testimony taken by the committee shows that certain trust companies feel that in the event of their being made trustees of a trust indenture, their own law department is justified in preparing this trust deed and charging their client for the legal services performed.

The following is an advertisement of one of the principal title companies, appearing during September, 1914, and similar bids for business are to be found in the panels to the surface and underground cars of the city:

"Your chief thought now is the welfare of your family. Have you had the forethought to make a will that will take the best care of them when you are gone?

"Bad investments have wrecked many estates. If you make us your executor, we will invest your money profitably and carefully in the good mortgages constantly passing through our hands.

"Not one dollar of the trust funds left in our care ever has been lost. Better consult our trust officers about your will to-day. Next week may be too late."

The testimony taken in regard to collection agencies shows conclusively that a vast number of corporations exist which hold out to the public their right and ability to conduct the collection of mercantile accounts, which collections are made and fees charged for by the corporation employing young lawyers in their office, who appear as attorneys of record in the cases. This business is very frequently solicited by all forms and descriptions of advertising, and not only in many cases are the proceedings very badly handled, but in some instances, which have been brought to our attention, these concerns are, to say the least, corrupt.

There are a large number of corporations organized under the laws of New York and other states engaged in organizing other corporations and giving legal advice in connection therewith, the work being done by young and inexperienced lawyers in their employ, using forms for this work that are printed wholesale, without giving any consideration at all to the particular corporation to be organized or its requirements.

There is quite a general movement throughout the profession to restrict the practice of law to capable lawyers. There does not seem to be any use for the bar to insist on raising the requirements for admission to the bar, and at the same time to permit laymen, without any qualifications at all, to practice at the expense of the public welfare, and this should include insurance companies and trust companies and all others who have undertaken to perform much of the business which a solicitor or attorney should transact, and which requires some knowledge of the law.

A. H. R.

THE DECLARATION OF LONDON IN RELATION TO NEUTRALS AND CONTRABAND.

As is widely known, the Declaration of London had not been ratified when the European war broke out, and therefore had not the international sanction which by agreement belongs, for instance, to the Declaration of Paris. Yet early in August the British government announced that in agreement with France and Russia it would —subject to modifications and additions— enforce the Declaration of London, the intention being to prevent as far as possible irritation among non-combatants. The fact that Germany being herself blockaded was drawing supplies through neutral countries has, however, caused Great Britain to modify by Proclamation the Declaration of London, and we wish to direct attention here to three respects in which that has been done in regard to the subject of contraband and its carriage by neutrals.

(1) The Declaration of London contained three agreed lists:—(a) Absolute contraband, being articles primarily useful in war; (b) conditional contraband, being articles of dual use, susceptible of peaceful as well as war-like use; and (c) a free list of articles ostensibly of no use in war and hence never liable to be declared contraband. On the mere outbreak of war all restriction. To the absolute list could only be added articles of the like kind, i. e., primarily useful in war. To the conditional list articles, from the free list could not be added. But the enormous demands of a modern belligerent has shown that these lists are quite inadequate. The British government has accordingly issued new lists. The new list of absolute contraband contains 26 categories as against 11 in Article 22 of the Declaration; the conditional list 15, as against 14; and the alterations in each are great. For instance, rubber, hides, sulphur and glycerine formerly on the free list are now on the conditional list; and articles of dual use such as iron, oil, etc., are placed on the absolute list.

(2) Of course, absolute contraband is liable to capture and confiscation if intended to reach the enemy, and it does not matter that it is carried in a neutral ship and bound for a neutral port. In the cases which arose during the Napoleonic wars it was argued on behalf of neutrals that a neutral ship going to a neutral port with contraband was not carrying it to the enemy, and that the other belligerent had no concern with the trade of a neutral country. But Lord Stowell ruled that the ultimate, not merely the immediate destination had to be considered and that principle known technically as the doctrine of "continuous transport" is now, with regard to absolute contraband universally acknowledged and found a place in one of the Articles of the Declaration of London, which declares that "absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, and it is immaterial whether the carriage of the goods is direct or entails transhipment or a subsequent transport by land."

But according to the proposals of the (unratified) Declaration of London, the doctrine of continuous transport was not intended to apply to conditional contraband;

to or occupied by the enemy and when it is not to be discharged in an intervening neutral port." By this rule, foodstuffs for the enemy forces going to a German port in a neutral vessel could be seized as conditional contraband, but food consigned to say, Rotterdam, though the shipments might be so large as to show that they were ultimately destined for the German forces, was not liable to be treated as conditional contraband. The British government have, however, intimated that they intend to apply the doctrine of continuous transport to conditional contraband as well as to absolute contraband, so that food, for instance, if proved to be destined for the enemy forces may be seized as contraband even in a neutral ship bound for a neutral port.

(3) Then again, under the Declaration of London, conditional contraband was only liable to capture if destined for the use of the armed forces or of a government department of the enemy state, thus food, to take the same instance, meant for consumption by the civil population of Germany would have under that provision escaped capture. The Declaration of London then set out certain tests to determine whether articles in the conditional contraband list were destined for the armed forces of the enemy and not merely for the civil population. There were four:

(1) Consignment to enemy authorities.

(2) To a contractor established in the enemy country who as a matter of common knowledge supplies the enemy.

(3) Consignment to a fortified place; or

(4) To a base.

The British government have, however, intimated a fifth test which they propose to apply in order to fix the destination of articles of conditional contraband. Guilty destination "shall be presumed to exist if the goods are consigned to or for an agent of the enemy state, or to or for a merchant or other person under the control of the Belgium is at present "under the control of the authorities of the enemy state," it will be seen that the clause above quoted virtually prohibits neutrals supplying conditional contraband such as foodstuffs, grain, clothing, fuel, harness, etc., to anyone in the enemy jurisdiction. And since this last proclamation was issued, the situation has further developed. The German government has formally announced that the food resources of the nation have been placed under government control. This simplifies the question; and now, in effect, any food cargo for Germany is liable to seizure even under the original terms of the Declaration of London, not to speak of the additional tests announced. Even so innocent a ship as the *Wilhelmina,* which was despatched by German-Americans loaded with food for the civil population of Germany, may not escape condemnation. In any event, she has been seized, and the matter will now be determined by the British Prize Court, though perhaps by diplomatic arrangements the question may be settled otherwise; by, for instance, the American embassy in Germany undertaking the control and distribution of the cargo.

DONALD MACKAY.

Glasgow, Scotland.

APPROPRIATION OF WATER FOR THE IRRIGATION OF LANDS IN THE ARID AND SEMI-ARID STATES.

A farmer living in one of the Atlantic states, having heard or read of the wonderful fertility of the soil in what he terms "the West," determines to take a trip and observe first handed the facts. He may travel, on this trip, half across the United States until he comes to the middle of Kansas before observing any marked change to speak of in farm conditions; but, as his train then speeds westward ered with crops to the like of which he is not accustomed. He is now in the land of irrigation. Though he travel through to the Pacific, straight west, northwest, southwest, he is in the land where his knowledge of riparian rights is largely of no avail and he hears of the appropriation of water; hears men arguing fiercely, sometimes, over waste water, seepage water, high or flood water rights; hears for the first time strange phrases like "first come, first served," "first in time, first in right."

Caught, on this trip, by the fever of the West, its loveliness of climate, the grandeur of its mountains and plains, the hospitality of its people, our eastern farmer determines to turn rancher in one of the arid or semi-arid states. He is not long a resident of the state of his adoption before he learns some of the ins and outs of the irrigation laws of his state and of the west generally. What he learns of the law applicable to the appropriation of water for the irrigation of his land the writer will, briefly, attempt to tell in this article.

Origin of the Terms, "First in Time, First in Right."—When the "Forty-Niners" commenced to make use of water in their mining operations in California there were no customs, precedents, laws or courts to guide them. But water they must use and so, from the necessity of the occasion, they formulated customs and rules for its use. Later these rules and customs became the rule of decision in the courts and finally the statutes as enacted by state legislatures. Water must, in certain cases, be carried long distances, never to be returned to its original source, and the miners, caring little and knowing little concerning the doctrine of riparian rights, formulated the now well-known rule of "First come, first served" semi-arid and arid states as the foundation principle of the irrigation system.[1]

Sources of Water for Appropriation and Diversion.—In the early days of the west. when the country was thinly settled, when mining and cattle raising were the chief means of a livelihood, when agriculture was in its infancy, water was plentiful for all and therefore few questions arose over its sources of supply. But with the settling up of irrigable lands and the breaking up of the cattle ranges into small tracts for general farming purposes these questions became of vital importance.

So now when our lately transplanted eastern farmer buys an irrigated tract of land he learns among other things that his source of supply of water for the irrigation of his land may be a natural stream, no matter how small;[2] its ravines, canyons and gorges fed by rain or snow waters; underflow of water having a known, defined channel;[3] from springs, waste, and seepage waters.[4] He also learns that water flowing through an artificial channel, a ditch or canal, is not subject to appropriation.[5]

Essential Elements of an Appropriation.—Along with information as to the sources of supply of water, our rancher learns what is meant by an appropriation of water. He is told by his lawyer friend, in language rather above his immediate understanding, that an appropriation "is the intent to take, accompanied by some open, physical demonstration of the intent and for some valuable use."[6] He is informed, also, that "a mere diversion

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(1) Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408; Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113; Mills Irrig. Manuel, Sec. 7.

(2) Colo. Const., Art. 16, Sec. 5.

(3) Platte Val. Irrig. Co. v. Buckers I. & I. Co., 25 Colo. 77, 53 p. 334; Whitmore v. Utah Fuel Co., 26 Utah 488, 72 Pac. 49.

(4) M. A. S. Reed. Colo., Sec. 3622; R. S. 1908. 3177; Beaver-Head Canal Co. v. Dillion Elec. Lt. & Power Co., 34 Mont. 135, 85 Pac. 880.

(5) Cardelli v. Comstock Tunnel Co., 26 Nev.

of water from a stream does not constitute an appropriation recognized by statute. To make such, there must be an appropriation of the water to a beneficial use and in case of irrigation, it must be applied to the land to make the appropriation complete."[7]

"An appropriation of water to a beneficial use." That is the important point. By all right-minded irrigators this is kept in mind. But the "water-hog," takes all he can get regardless of its beneficial application and he is not satisfied except when trying to get more. This animal is sometimes an individual, sometimes a corporation, but in any event he is a curse to the conscientious user of water. His unlawful methods of getting water are many. In times of scarcity he obstructs the channel of the stream to raise the water for his own headgate; he changes the headgate of his own ditch to the detriment of his neighbor's supply of water; bribes or intimidates the water commissioner in his district to let more water into his ditch than he is entitled to and when called to account by a prior appropriator he tells him to "go crack your whip; what I and the court will do to you will be a plenty," for his ideas are inflated as to his importance and his influence with the courts. Let it be said here that a reading of the cases shows how strictly the courts are set against all such unlawful influences and practices.

Who May Exercise the Right of Appropriation.—It is an open field, and no restrictions are made on account of race, color or previous condition of servitude. Municipal as well as private corporations can appropriate.[8] He need not be the owner in fee simple of the land for which he seeks an appropriation, for a lessee of such land may appropriate.[9] Irrigation districts may make valid appropriations.[10]

Procedure in Obtaining an Appropriation of Water.—Our rancher now decides that he is entitled to more water for land than he can bring under cultivation, and that he will build a new ditch in order to get it. So he seeks out his lawyer friend who tells him that the first step will be to get a surveyor, and that the surveyor, if he knows his business, will take all the preliminary steps in the matter.[11] The surveyor then proceeds to make a plat or map of the proposed ditch or canal showing the location of the headgate by course and distance to a corner of the public survey, or if on unsurveyed lands, to two or more natural objects of a permanent character; the route of the ditch or canal; the general course of the stream and its name; the 40-acre tracts or other subdivisions and patented lands through which the ditch or canal passes, together with the ownership of all lands crossed by the ditch or canal; and other details that need not be gone into here. Attached to such map or made a part of it (usually the latter), is a statement showing the point of location of the headgate of the ditch; its depth, width, grade and length; its carrying capacity; time of commencement of work on the ditch, which time may be the date of the commencement of the surveys therefor, or of the commencement of the actual work of construction; the estimated cost of the project. This map and statement are then sent to the state engineer's office for his approval or rejection. Should this official approve of the data therein contained he files it with his acceptance endorsed on it, but first making a blue print of the map and statement together with a negative print of it. This print is then sent to the rancher, who is required to file it with the clerk and recorder of the county wherein the headgate of his ditch lies within ninety days from the time stated as the date of commencement on the ditch. The above embraces the principal points of the rancher's duties so far; other details would seem to be out of place in a short article of this character.

The work on the rancher's ditch is now commenced and he must prosecute the work with all reasonable diligence to completion. Having done so he again seeks out his attorney and tells him he desires a decree of the district court adjudicating his right to so many cubic inches of water to his ditch. The fee is then agreed upon and the lawyer very cheerfully or otherwise (his cheerfulness being governed somewhat by the size of the fee) proceeds to draw up his client's petition for an adjudication. This paper is styled in Colorado, a motion, petition or application in writing (though usually called a petition). After a proper caption, the petition, readdressed to the judge of the district court, usually sets out: 1. The name or names of the petitioner or petitioners. 2. That he is the owner, claimant or lessee, as the case may be, describing it, of the land under the ditch. 3. That the petitioner is the owner of the ditch, giving its name; and that its source of supply is a certain stream, naming it; that the headgate of said ditch is located at a certain point within the water district wherein the adjudication is sought. 4. That the size, grade, length and carrying capacity of the ditch is so and so. 5. The date of the appropriation of water by original construction of the ditch, the amount of water claimed by and under such construction, and the cost of construction. 6. The number of acres lying under the use of water for irrigation between the several ditches, canals and reservoirs in the district; also for an order that notice of the proceedings may be made by way of publication and posting and not by personal service, provided the petition states that service or notice by personal service cannot be made in a practical manner, as where the parties entitled to notice are very numerous. The petition should be verified as in other cases.

Accompanying the petition, because usually prepared by the attorney drawing the petition, is the order of the court, setting a date for the hearing on the petition and requiring notice to be given to all persons interested. The judge having signed the order, it, with the petition, is then filed with the clerk of the court. The notice, immediately prepared by the clerk, if the same is not already written out by the attorney, which he should do, is published in a public newspaper in the county in which the water district above mentioned extends, and in the county where the proceedings are started for four successive weekly publications, the last of which shall be on a day previous to the date set for the hearing. If the county in which the petition is filed is a large one and there are several newspapers published in it, the newspaper published nearest the location of the ditch is usually selected (and especially so if it is of the right political complexion). The notice shall contain a copy of the order and is addressed to all persons, associations and corporations interested as owners in any ditch, canal, or reservoir in said water district, requiring them to attend the hearing on the petition and protest, if they so desire, under oath, against the application of the petition for an adjudiof the newspaper publication is made by the sworn certificate of the publisher and shall be at the expense of the party moving the adjudication. Proof of the posting of the printed copies shall be by affidavit of some creditable person certified to be such by the officer administering the oath, showing when, where and how the copies were posted. After a general decree has once been entered in any water district, the petitioner has the privilege of serving his notice by either publication and posting or publication and personal service of the notice or by service of notice as the service of summons is made in other civil cases.

The day for the hearing has now arrived. The rancher arrives in town accompanied by his witnesses, if any are needed. The court then proceeds to hear all evidence, either for or against, the petitioner. The proceedings are conducted, of course, as in the trial of other cases, the petitioner first offering his evidence in support of his application for an adjudication, the protestants, if any, then offering evidence against the application. The court will also consider any evidence which may have been heretofore offered and taken in the district in the same matter by a referee. After the evidence is in, argument of counsel is permitted, if so desired. From the evidence and from argument of counsel, the court shall ascertain, as near as may be, the date of the commencement of the ditch; its original size and carrying capacity as originally constructed; the time spent in its construction; the diligence with which the work was prosecuted; the nature of the work as to difficulty of construction, and all other facts which may tend to show a compliance with the law in such cases.

After the evidence is all in

consecutive order, according to date of original construction; the amount of water held to have been appropriated by virtue of such original construction, describing such amount in cubic feet per second of time; the priority number of the appropriation of water according to date of original construction; the purpose for which the appropriation is granted, as, in the case of our rancher, for the irrigation of land; and finally that the decree be taken and held subject to all water rights adjudicated in the court (wherein proceedings were instituted), four years or more prior to the date of the filing of the petition and also subject to the provisions of any general decree which may have been previously entered adjudicating water rights generally throughout the water district; also that the petitioner pay the costs of the proceedings to be taxed.

With a copy of this decree in his pocket, our rancher feels reasonably secure in his rights. But, for four years after the decree is rendered, there is nothing to prevent any person, association or corporation, whose interests may have been affected by the decree, from bringing and maintaining a suit to determine his claim for water under the decree.

John E. Ethell.
Glenwood Springs, Colo.

ESTOPPEL—DEED BY TRUSTEE.

CRUMP v. SANDERS.

Court of Civil Appeals of Texas. January 15, 1915.

173 S. W. 559.

One who, as trustee of a lodge, executed a warranty deed conveying certain lots, of part of which he was then as an individual in adverse possession, but had not acquired title thereby, is estopped to claim such adverse pos-

lots Nos. 6 and 7 in the town of DeKalb, Tex. The lots are described by reference to a plot of the town made by the Texas & Pacific Railway Company which was recorded in the office of the county clerk of Bowie county. The defendant in error answered disclaiming as to a portion of lot No. 7, and as to the remainder by plea of not guilty and title by adverse possession for a period of more than 10 years. He also in a supplemental answer suggested improvements in good faith. At the conclusion of the evidence, the court gave a peremptory instruction in favor of the defendant in error for the title and possession of all the property sued for. The following is the substance of the undisputed facts upon which the defendant in error relies to support the verdict and judgment rendered: A conveyance by the Texas & Pacific Railway Company to A. M. Getts in February 1901; a general warranty deed from Getts and wife to A. G. Crump, the plaintiff in error, R. T. Lacy, and J. B. Hatchell, trustees of De Kalb Lodge No. 285 Knights of Pythias, dated August 22, 1908, and duly recorded; a general warranty deed dated September 11, 1908, from R. T. Lacy, A. G. Crump, the plaintiff in error, and J. B. Hatchell, trustees of De Kalb Lodge No. 285, Knights of Pythias, to himself. The plaintiff in error proved as the basis of his claim that in 1901 he received a conveyance from the Texas & Pacific Railway Company to lots 1, 2, 3, 4, and 5 of block 4 as shown on the plot of the town of De Kalb; that about the time this purchase was made the agent of the railway company pointed out to him a point as his southwest corner, telling him that he relied upon that designation as his true southwest corner, and fenced all of lots 1, 2, 3 4, 5, and 6 and a portion of lot No. 7; that he had been in possession of the property, claiming the same adversely, since that date. As rebutting the adverse claim of the plaintiff in error, the defendant in error offered in evidence the deed made by the trustees of the Lodge of the Knights of Pythias, among whom was the plaintiff in error, conveying the property to the defendant in error in 1908, as estopping the plaintiff in error from asserting any adverse claim based upon possession prior to that deed.

(1) The only assignments presented in the record are those which assail the right of the court to give a peremptory instruction. The proposition is asserted that the evidence cussing these assignments, is: Did the evidence raise an issue of fact as to the acquisition of a title by the plaintiff in error by 10 years' adverse possession? It should probably be conceded that it does unless the plaintiff in error is estopped by his deed as a member of the board of trustees of the Knights of Pythias Lodge executed in 1908. That deed the record shows contained a general warranty. It is now well settled by the decisions, both in this state and out of it, that the rule of estoppel by deed applies to a grantor who executes it in a fiduciary or representative capacity, as well as the one who conveys property in his own right. Corzine v. Williams, 85 Tex. 499, 22 S. W. 399; Parks v. Knox, 130 S. W. 203; A. F. L. M. Co. v. Walker, 119 Ga. 341, 46 S. E. 426; 16 Cyc. 712, and cases referred to in the notes. If that rule be applied in this instance, the appellant is estopped from claiming any personal rights, either to the title or to the land in controversy or to the appurtenances situated thereon, which have not accrued since the execution of the deed as trustee for the lodge. It is not contended that at the date of this deed the plaintiff in error had any paper title to the property, or that he had then acquired a title by limitation. He does not deny that at that time the lodge had a perfect right to convey the title to the defendant in error. The extent of his contention is that he was then in possession under a baseless claim of ownership, which, if undisturbed, would have ripened into a title by limitation before the date of this suit.

The only purpose for which it becomes necessary to invoke an estoppel by deed in this instance against the grantor is to prevent him from claiming the benefit of a hostile prior possession. There certainly can be no injustice in construing his deed as implying the relinquishment of a claim which is admitted to be without foundation in either law or equity. It follows, then, that his adverse possession can only be permitted to date from a time subsequent to the date of his deed, and that restriction confines him to a term too short to perfect a title by limitation.

(2, 3) In order to escape the legal consequences of his deed, the plaintiff in error contends that he was mistaken as to the location of lots 6 and 7 described in the conveyance; that, had he known they were the same property on which his improvements stood, he would not have signed the deed as trustee

of this mistake, or was guilty of any conduct which caused it to be made. This mistake, even if given full legal effect, can only be invoked to protect such property rights as the plaintiff in error had acquired at that time. According to both his pleadings and testimony, those rights were limited to his improvements made upon the property in good faith. In order to protect such rights, the party claiming them has the burden of proving the facts necessary to enable the court to render the judgment provided for in the statute. Thomas v. Quarles, 64 Tex. 491; Herndon v. Reed, 82 Tex. 647, 18 S. W. 665; Durham v. Luce, 140 S. W. 850. A failure to make such proof justifies a judgment refusing an allowance for improvements made in good faith. There was no proof whatever in this case of the value of the improvements or of the land, either with or without improvements. But it is contended that the pleadings of the plaintiff in error suggesting such improvements were not denied, and that the facts there stated should be taken as admitted. Conceding for the sake of argument, that this is a correct proposition, the facts are still insufficient when we look to that source. In the answer referred to, the plaintiff in error states only the nature of his improvements, and their value. The court could not upon such facts render the judgment provided for in article 7763 of the Revised Civil Statutes. In the first case cited above, the court said:

"In the court below the defendant pleaded improvements in good faith, but on the trial there was no evidence of the value of the land without the improvements, and hence their value and defendant's good faith were not passed upon in the findings. There was proof of the value of the improvements made. But the statute does not award to the defendant such value, but only the difference between the value of the land with, and its value without, the improvements. The defendant therefore, in failing to prove the value of the land, left the court below without the means of awarding him the benefit of his plea. If the right under which the plaintiff recovered had been such as could only have been enforced in a court of equity, she would not have been permitted to recover without indemnifying the defendant for his improvements. Story's Eq. vol. 2, § 1238. But, as already stated, her right and remedy were legal, and the defendant could therefore only rely upon his statutory right for such in- occupant pleads improvements in good faith. His remedy is statutory. Having failed to make proof necessary to enable the court to give the statutory relief, he is not entitled to its recovery.

The judgment is affirmed.

Note.—*Estoppel Against Attesting Witness to a Deed Setting Up Independent Title.*—The doctrine declared by the instant case as applicable to such facts as are therein stated seems quite universally ruled, and it extends not only to a presently owned interest but even to one subsequently acquired. Central Coal & Iron Co. v. Walker, 24 Ky. Law Rep. 2191, 73 S. W. 778. But it does not work both ways, that is to say, one conveying as an individual is not estopped as to property subsequently acquired in a representative capacity. Lauve v. Wilson, 114 La. 699, 38 So. 522. Nor does it even as to presently owned property operate where both grantor and grantee knew the facts but were mutually mistaken about the law. Gjerstadgen v. Van Duzen, 7 N. D. 612, 76 N. W. 233, 66 Am. St. Rep. 679; Gjerstadengen v. Hartzell, 9 N. D. 268, 83 N. W. 230, 81 Am. S. T. 575.

The doctrine is applied according to the rule of estoppel *in pais* which requires that when a false representation or concealment is made, the other party being ignorant of the facts, there be intent that he should rely thereon and proof that he does so rely. Blodgett v. Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307; Priewe v. Wisconsin State Land, etc., Co., 103 Wis. 537, 79 N. W. 780, 74 A. S. R. 904. And this feature of the doctrine is especialy applicable to the case of one merely witnessing or taking the acknowledgment to a deed or other conveyance. It was thus declared in a Georgia case, though it was conceded that the estoppel would bind even a creditor of the party estopped, had he been a grantor in any capacity, instead merely of an attesting witness. Equitable Loan & Security Co. v. Lewman, 124 Ga. 190, 52 S. E. 599, 3 L. R. A. (N. S.) 879.

If a witness to a deed claims some right in the premises sold, though it be merely an easement, and fails to disclose it to the grantee ignorant thereof, he will be estopped from asserting it. Stevens v. Dennett, 51 N. H. 324. And so one who takes an acknowledgment, knowing the contents of the deed, he will not be allowed to dispute rights of the grantee. Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 494; Morse v. Byam, 55 Mich. 594, 22 N. W. 54.

But a witness to a deed is not estopped from asserting rights as to the property therein previously conveyed to him, when the present grantee had actual notice of such prior deed. Hale v. Skinner, 117 Mass. 474.

And where a mortgage has been duly registered, the mortgagee therein is not estopped by becoming a witness to a subsequent mortgage, as the later mortgagee is bound by constructive notice. Brinckerhoff v. Lansing, 7 Johns. Ch. 65, 8 Am. Dec. 538.

Nor is a witness to a deed estopped by recitals

In a Michigan case where executors sold land without authority of law it was held that a devisee under the will was not by becoming a witness to the deed estopped from attacking its validity. Vincent v. Evans, 165 Mich. 695, 127 N. W. 760. There is no discussion of the point ruled.

Upon the general subject of estoppel against one executing a deed in a representative capacity so far as his personal rights are concerned, there is an interesting case note found in 21 L. R. A. (N. S.) at page 60. C.

REVIEW OF CURRENT PERIODICAL LITERATURE OF INTEREST TO LAWYERS.*

(Edited by A. H. R.)

Bankruptcy. "Practical Results of the Administration of Estates of Insolvents Under the Bankruptcy Law of the United States." By David W. Amram, of the Philadelphia Bar. 35 Canadian Law Times, p. 12 (Jan.).

This very interesting review of the results of the American Bankruptcy Law is a reprint of the address of the author before the Ontario Bar Association. The author reviews the history of the passage of the American Bankruptcy Acts and their subsequent repeal and the reasons therefor. He contends that while public opinion forced the Bankruptcy Act, yet in the early history of the American commonwealth the states were jealous of encroachments on the part of the Federal Government, and that the clashes with state courts and state law, which necessarily resulted in the administration of a Federal Bankrupt Act, caused considerable dissatisfaction. The author meets the various objections that have been and are still being urged against bankruptcy legislation and defends the Bankruptcy Law as being not a cloak for fraud, but based upon three fundamental purposes—honesty, mercy and equality.

Christianity in the Law. "Christianity and Law." By Ernest G. Stevens, of New York City. 49 American Law Review, p. 1 (Jan.-Feb.).

The author argues very learnedly in favor of the proposition that religion is the source of all law; that our law, like the laws of all other nations and peoples, sprang from the religion of the people, and is guided by the standards of morality erected by those religions; but he further contends that Christians alone, among religionists, have separated religion from law; that while the Mohammedan, Buddhist and the Confucianist regard religion and law as being identical; while those of the Christian entirely from the Ecclesiastical administration of the probate courts in England and of the Equity Tribunal, the conceptions of justice governing all the fundamental principles of these two great branches of the law were announced originally by religionists according to standards of morality acknowledged by the Christian church at that time.

Then the author takes up such maxims as Sic utere and others. He shows that this maxim declared negatively what the Golden Rule declared positively. That modern decisions and modern statutes proceed on the principle of the Golden Rule.

The author discusses the rules nullifying contracts and transactions in equity as being unconscionable. The conscience here offended is a conscience, according to the author, that is guided by Christian principles, quoting Justice Story's declaration to that effect in the case of The Schooner Emulous, 1 Sumn. 207. The author's argument, however, while interesting, fails to prove that there is any such direct connection between religion and law in civilized countries as in countries where religion predominates over the life of the people.

Courts. "The Qualities of Current Judicial Decisions." By John H. Wigmore. 9 Illinois Law Review, p. 529 (March).

This is a learned critique by the Dean of the Northwestern University Law School of the methods of modern appellate judges in declaring the law. Mr. Wigmore's opinion is that the quality of judicial opinions of the present day is very low in the great majority of cases, and he sums up the deficiencies of the courts under six heads: first, the lack of acquaintance on the part of the judges with legal science; second, unfamiliarity on the part of the judges with what are really controlling precedents in their own states; third, over-emphasis on the technique of legal rules in detail, with corresponding over-emphasis on policies, reasons and principles; fourth, an undue servitude to the bondage of precedent; fifth, over-consideration of every point of law that is raised in the briefs, no matter how complicated; sixth, the fact that opinions are usually the views of one member of the court rather than the views of the whole court.

Mr. Wigmore considers two other objections to the work of the judges, but which he finds are not really tenable, to-wit: first, corruption and political bias; second, economic and class bias. The instances wherein these objections have been found to exist are so rare as to be cause for congratulation, although the muckrakers and shallow magazine writers seize upon these objections in the great majority of the attacks made upon the judiciary.

able," says Mr. Wigmore, "unless within the profession we set about analyzing them and seeking consciously to remove them. And this is why the emphasis has been put on the six traits already enumerated. They are traits of the judiciary in the core of their professional work—traits of their way of doing justice under the law."

Under the first objection or "trait" which the author specifies, the attention of the profession is directed to the almost complete absence of any historical or philosophical treatment of the law in recent decisions; that there is very rarely any citation to such a work as Pollock and Maitland's History of the Law, or to the works of Austin, Holland, Terry and others on the philosophy and jurisprudence of the law; for which reason there appears to be no discrimination in the use of expository authorities, but a very evident relish for the products of hasty hack-writers and callow compilers. "The indifference to legal science," says Mr. Wigmore, "the judges share with most of the profession. What they respect is mere precedent—a prior decision, and the latest decision."

To prove his second point the author calls attention to the number of cases where the courts very seldom go beyond the briefs of counsel, and thus are led in subsequent cases to see the error of their former conclusion, which they usually excuse on the ground that that point was not called to their attention. This tends to prove, the author declares, that judges do not know the law of their own state, nor what are controlling precedents. This shortcoming, the author thinks, is largely due to the fact that the judges are too hurried in their work and that they do not serve long enough to become familiar with the precedent law of their own court, and that furthermore, they are not assisted by the bar, who, as a general rule, are not scholarly nor thorough in their presentation of authorities.

In proving his third point the author thinks that the courts show too great satisfaction in discovering a legal rule upon which they can hang a decision than on finding a principle of justice that controls it, and that the courts permit cases to ride off on technical rules of law rather than upon any careful analysis of the principles applying thereto. This results frequently in very dry repetitions of rules in opinion writing.

The fourth shortcoming, the author admits, is a profound problem in legal philosophy, but he observes that the courts do not appear to be endeavoring to solve the problem or even to have considered it, although it is the subject of earnest study by jurists in Europe and America. The author observes that most judges regard precedent as a "fetish of immutability," and disregard the fact that there is infinite weight of authority having absolutely no binding effect in their jurisdiction.

In proving his fifth point the author commends the courts for "faithfulness and industry," but asserts that their opinions look more like a library catalogue or a table of contents than a learned exposition of the law.

Of the sixth "trait"—the one-man opinion, the author is not able to say how far it is prevalent, but recent admissions as well as investigations of the opinions of the courts suggest that it may be more far reaching than is supposed. The author contends that no member of the court has any authority to declare what is or what is not the law; that no opinion should be given unless it expresses the opinion of the whole court or the majority of the members. The opinions, as well as the decisions, the author contends, should be intellectually the view of the court and not the view of one member of the court, otherwise it will not only be unreliable but dangerous in its effect.

In the author's closing paragraph he takes up specific instances, showing evidence of these traits in certain opinions cited.

Easements. "Distinction Between Natural Easements and True Easements." By Harry A. Bigelow, of the University of Chicago Law School. 9 Illinois Law Review, p. 541 (March).

This is a very analytical and learned presentation of the confusing distinction existing between what are sometimes called natural easements and true easements, the former being referred to as such rights as one has in the right to the flow of a stream or that it shall not be polluted; or to the right of support for land in its natural condition; or the right to have the air not unreasonably deteriorated by odors or noises; while true easement rights are called rights of use, drainage, support for buildings, etc. The author suggests that the natural easement is a misnomer, and that failure to observe this fact has occasioned the bringing of suits by attorneys on false premises. He calls attention to the case of Ladew v. Tennessee Copper Co., 218 U. S. 357, where the plaintiff sought to secure damages against defendant for defiling the air with noxious odors so that timber on adjacent land was destroyed to the extent of $50,000. The proceeding was brought on the theory that the party had an easement or right in the land of the defendant, and that defendant's use of this land was a violation of plaintiff's easement rights. The Supreme Court, the author contends, properly denied relief, on the theory that plaintiff's right was not an easement, but a natural right that had been invaded by the defendant, for which the defendant was liable in personam and not in rem. The author shows the distinction by the simple illustration that the same rule is true where an adjacent land owner diverts water upon another's land, or diverts the flow of a stream, or pollutes the air, etc. He calls attention to a further difficulty with respect to conflict of jurisdiction as, for instance, where two tracts of land are separated by a state boundary line. A right of way over such land, which is true easement, may be taken by eminent domain by the action of either state because it is a mere right in land over which each state has full control, but neither state can, by eminent domain, deprive the adjoining owner in another state of his right to the use of a stream or divert water from one tract to the other for the reason that this right is not a mere interest in land, but a natural right. The article is valuable in making many other distinctions of this character.

Criminal Procedure. "A Proposed Draft of a Code of Criminal Procedure." By William E. Mikell. 5 Journal of Criminal Law and Criminology, p. 827 (March).

This is a resume of the report of the committee of the Institute of Criminal Law and Criminology, which was authorized to submit a proposed draft of criminal procedure. The code contains 41 sections, remarkably brief when compared with other criminal codes. It is exceedingly simple and liberal in its provisions, removing many of the obsolete so-called safeguards with which the common law surrounded the defendant.

Crimes. Classification and Definition of Crimes. By Ernst Freund. 5 Journal of Criminal Law and Criminology, p. 807 (March).

This article is a summary of the report of Committee D of the Institute of Criminal Law and Criminology, and is a careful statement for purposes of codification of a proper classification and definition of crime. The author distinguishes between specific offenses and generic offenses. He also discusses the division and classifications of the German Penal Code and other Codes. A large portion of the article is taken up with illustrations of the shortcomings of specific definitions of crime in various statutes, showing the confusion that results from such improper definitions. The article will be particularly valuable to legislative committees, and should be and probably will be circulated widely among the members of the various state legislatures. It should also be observed by writers of text books on criminal law.

Judges. "The Mode of Selecting the Judiciary." By Joseph W. McGrath. 9 Bench and Bar, p. 429 (Feb.).

The author, who is editor of Bench and Bar, in a three-page editorial discusses the different modes of selecting a judiciary, the purpose of the editorial being to advise the constitutional convention of New York in the matter of the proper selection of the judiciary. He takes up English method of selection of Inferior Judges by a Chief Justice, would not be acceptable to the electorate as it would put too much power in the hands of one man. On the other hand, the author believes that the electorate would not cling tenaciously to the right of electing judges provided their appointment is put into the hands of a man who is subservient politically to them, and he suggests the appointment of all judges of the state by the governor with the approval of the senate.

International Law. "The Transfer of Merchant Vessels During War." By Archibald R. Watson. Bench and Bar, p. 437 (Feb.).

The author takes issue with Senator Root's contention in the argument over the shipping bill that citizens have no right under recognized international usage to purchase a merchant vessel of a belligerent. The author calls particular attention to the case of the Steamship Georgia v. United States, 7 Wall. 32, in which case it was held that while the ship in that case, which was a Confederate war vessel that had been sold to an English citizen, was liable to capture after its sale, yet that the rule would have been different if the vessel sold had been a merchantman. The author gathers together many of the rulings of the Privy Council of England and of the Attorneys-General of the United States.

Parole. "The Parole System as a Means of Protection." By Robert H. Gault, of Chicago. 5 Journal of Criminal Law and Criminology, p. 799 (March).

This article discusses the question whether parole law affords any good results so far as the public is concerned. The author takes up the history of parole laws, and has done some laborious work in showing when the parole law of each state has been adopted, and the proportion of men on parole in the various states, giving also those who have "made good" and those who have failed to take advantage of the public leniency. He shows that the general result is that 83 per cent of all parole prisoners make good, while 17 per cent are failures. He calls further attention to the fact that the 17 per cent who are reported as failures as a rule violated the order to report regularly each month to some state officer, and in many other cases the subsequent offense was either drunkenness or vagrancy, the smaller per cent being felonies. The conclusions of the author are as follows:

1. The parole system is in force in more than thirty states and several foreign countries, and once adopted, has never been discontinued.
2. The latest and most inclusive figures from all sources show that more than 80 per cent of men on parole make good.
3. The most accurate figures available indicate, in contrast to the large proportion of recidivists under the old system, that only about 5 per cent of men on parole commit new crimes while paroled.

of habitual criminals; rather the reverse, but their closer detention can do no harm.

6. The cost of parole averages less than $5,000 a year for each state and not over $25,000 in any case.

7. The parole system has saved to the states more than ten million dollars or more than five times what it cost.

8. The parole system has saved to society through the earnings of men on parole, by conservative estimate, over $30,000,000.

Prizes. "The Case of the Dacia." By John D. Falconbridge. 35 Canadian Law Times, p. 140 (Feb.).

The case of the steamship Dacia, a ship formerly belonging to the Hamburg-American line, recently sold to Edward N. Breitung, of Marquette, Mich., an American citizen, which was seized with a cargo of cotton while on its way to Bremen, has aroused considerable interest both in this country and abroad. The case is now before the Prize Court of France on appeal. The author admits that the cargo of the Dacia is not contraband and could not be seized as a prize, but discusses the question whether the sale of the vessel by a belligerent to an American citizen is valid. He reaches the conclusion that it is clearly necessary for the validity of any such transfer that the sale should not be subject to any condition or tacit understanding by which the vendor retains any interest in the vessel or enjoys any right to repurchase at the conclusion of the war. The author reviews the judgments of the Privy Council in a number of cases, and the argument is a very valuable presentation of the fundamental principles governing such cases.

Procedure. "Studies in English Procedure. By Samuel Rosenbaum, of London. 63 University of Pennsylvania Law Review, p. 105 (Dec.).

This is the beginning of a series of articles on the subject of English procedure, the first installment being entitled, "The Atmosphere." The author contends that procedure cannot be gathered from books alone, but also from personal contact with the men who are engaged in the application of these rules, and the methods that they use in handling them, as well as the unwritten practice that custom and tradition have established. The author says that in England interlocutory motions and decrees are not made according to any strict rule of law, but are worked out amicably between court and counsel sitting in chambers. Here the judge and lawyers come together and rules are never permitted to be insisted upon against the inherent justice of the case. In other words, no attorney is permitted to take advantage of a mere delay in filing answers to interrogatories, for instance, if the defendant shows proper excuse

He also shows that the atmosphere of the English bar is more permeated than our own standards are therefore very high in England, for instance, Mr. Rosenbaum says, "It is a breach of etiquette for a barrister, if he moves his chambers from one part of his Inn to another, to send out notices of that fact to his clients, as that would be taken as a bid for business." Another point of interest to American lawyers is that the secret of the reason for the great respect given in England to courts, Mr. Rosenbaum believes is to be found in the high dignity which surrounds the barrister, and also by reason of the high quality and ability of the judges who are selected. He states that in England, although the King, through the Prime Minister, may make all appointments, yet it is the practice that the Lord Chancellor nominates all candidates for the judiciary, he being a lawyer of high ability with great responsibility, as well as being the head of the judicial system in England, is fully competent to make selections that will be satisfactory to the bar. "English lawyers," says the author, "have always expressed the greatest surprise upon being told that in most of the American states the judiciary is elected, and that a judge is elected only for a short term of years. To them the ideas of judicial rank and complete independence of future financial problems are synonymous."

Rate Regulation. "Another Word About the Evolution of the Federal Regulation of Intrastate Rates and the Shreveport Rate Cases." By John S. Sheppard, Jr., of New York City. 28 Harvard Law Review, p. 294 (Jan.).

This article is in answer to an attack upon the decisions of the Supreme Court in the Shreveport Rate Cases, the author saying, "I think that an examination of the decisions of the Supreme Court involving construction of the various sections and clauses of the Constitution in respect of police power, due process, taxation and the like, discloses the same sound tendency to go behind the letter to the spirit and to make the line of precedent one of principle rather than of details."

Rate Regulation. "Federal Control of Intrastate Railroad Rates." By Henry Wolf Bikle. 63 University of Pennsylvania Law Review, p. 69 (Dec.).

The author discusses the jurisdiction respectively of state and national authority over railroad rates, referring particularly to the Minnesota rate case and the Shreveport case. He says that "Taken together, these two cases have established the important rule that Congress is clothed with authority under the Constitution to legislate with respect to intrastate rates when such legislation is necessary to the effective and complete regulation of interstate commerce." The author argues that the principle underlying these decisions is sound in law, and refutes the arguments of Wm. C. Coleman in an article published in the

George Whitelock, of Baltimore. 49 American Law Review, p. 75 (Jan.-Feb.).

The author, who is the Secretary of the American Bar Association and an expert in admiralty law, has taken great interest in the cases following the Titanic disaster, and discusses in this article a recent decision of the Supreme Court, 233 U. S. 718. He discusses the contention of the Oceanic Steam Navigation Company, owner of the Titanic and a British corporation, that its liability was limited in America to $91,000, representing the amount of salved property and freight. This contention was sustained by the Supreme Court of the United States, although the tort, if committed, was undoubtedly a British tort, and should apparently be controlled by English law, under which the liability is not so restricted. The restriction of liability thus imposed upon Americans suing in American courts is conditioned, however, under Act of Congress, upon proof of the fact that the negligent act was committed without his privity or knowledge. These preliminary facts have not yet come up for decision. The author condemns the provisions of the Act of Congress of 1851 and urges its immediate amendment in behalf of American citizens who are injured on the high seas.

Sociological Jurisprudence. "Interests of Personality." By Roscoe Pound, of the Harvard Law School. 28 Harvard Law Review, p. 343 (Feb.).

This article is a profound philosophical treatise on the subject of personal rights, and is, in fact, the substance of Chapter 9 of a book entitled, Sociological Jurisprudence, now in preparation. The author states that in determining what personal rights or individual rights should be secured by law, we must first ascertain what demands the individual conceivably may make as incident to personality, and he classifies the demands the individual may make of society under three heads, to-wit: first, those relating to the physical person; second, those relating to the personal honor (reputation); third, those relating to personal belief and opinion.

Torts. "Liability of Proprietor of Place of Public Amusement for Injury to Patron. By John D. Chamberlain, of Rochester, N. Y. 21 Case and Comment, p. 718 (Feb.).

The author discusses the liability of proprietors of race courses, theaters, circuses, and discusses this liability principally with regard to the dangers incident to the using of a dangerous animal; the danger of firearms; the collapse of seats; the falling of objects, as balloons; baseballs thrown by players or by employes.

Trusts and Trustees. "Constructive Trusts Based on Promises Made to Secure Bequests, Devises, or Intestate Succession. By Geo. P.

This article is a discussion of the question stated in the title, examining all the earlier decisions of the English chancellors, discussing gifts causa mortis, contracts to bequeath or to devise, or to die intestate, contracts for joint, mutual or joint and mutual wills.

ITEMS OF PROFESSIONAL INTEREST.

CHARLES E. SHEPARD—CHAIRMAN OF THE SECTION OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION.

Among the lawyers who have taken a definite interest in the problems of the profession, the Western states have furnished as large a contribution in proportion to the number of practicing lawyers as any other section of the United States, and the name of Charles E. Shepard, of Seattle, whose picture adorns our front cover page is not inconspicuous in this large company.

Graduating from Yale in 1870, Mr. Shepard began the practice of law at Fond du Lac, Wis., and later at Milwaukee, during which time he was one of the compilers of Shepard's Wisconsin Digest, published in 1882. In 1891 he moved to Seattle, and has had a large part in the marvelous growth of that metropolis of the Northwest, having served his city and state in many public capacities.

Our purpose, however, in calling attention to the lawyers whose pictures we publish from week to week is to give some recognition to those among our very busy lawyers who find time to devote to the larger interests of their profession, as such interests are represented by the activities of the American Bar Association. Mr. Shepard has devoted much time to work of this character, his most conspicuous service being his participation for the past ten years as a representative from his state in the deliberations of the Commission on Uniform State Laws, an interest that has been more than perfunctory. Mr. Shepard's wide scholarship and experience have been of service to the Commission, especially in the preparation of the Uniform Partnership Act, which has just been completed and given to the states for adoption. This act is said to be one of the most perfect codes that have yet been prepared by the Commission, and much of its perfection is due to the work of Mr. Shepard, who applied

At the last meeting of the American Bar Association, Mr. Shepard was made Chairman of the Section of Legal Education, and we feel sure that the interests of the profession in this subject will be properly taken care of.

Mr. Shepard is progressive in his ideas, but conservative in the methods to attain them. He has been a tower of strength to the profession in the West in opposing the idea of judicial recall and of the recall of judicial decisions. In a very scholarly and interesting address on the subject of the recall delivered in Seattle, Mr. Shepard gave expression to arguments against those two fallacies, proposed for the improvement of the administration of justice, which we regard as the most convincing we have ever read. One of the closing paragraphs of his address will bear repetition. Mr. Shepard says:

"Charles Lamb in his witty essay on roast pig tells how a Chinese and his boy chanced to set fire to their house and in it killed the old sow and her litter of young porkers which were their companions. As they were bemoaning their loss, they burnt their fingers handling the tender victims and, cooling their fingers with the tongue, discovered the fire had given them a lot of delicious roast sucklings. Whereupon with racial imitativeness their neighbors and all the country around set to work burning down their houses to get roast pig. We Americans have always boasted that we are inventive, not imitative. If we want to roast either our pigs or our judges, we do not need to burn down our house. We can do the job at less cost quite as well another way. And as for their decisions—to be rid of them, we would not make a bonfire of the parchment of our constitution."

We take pleasure in giving this short item of recognition to one whose modesty at first led him to demur to its publication, but we do it in order that the profession may become acquainted with one of those among its members who regard the improvement of the law and its administration as giving the highest ideals of their professional life. A. H. R.

BOOKS RECEIVED

The Law of Wills and the Administration of Estates. Enlarged edition. By Williams Patterson Borland, of the Kansas City

HUMOR OF THE LAW.

One evening just before dinner the wife, who had been playing bridge all the afternoon came in to find her husband and a strange man (afterward ascertained to be a lawyer) engaged in some mysterious business over the library table, upon which were spread several sheets of paper.

"What are you doing with all that paper, Henry?" demanded the wife.

"I am making a wish," meekly responded the husband.

"A wish?"

"Yes, my dear. In your presence I shall not presume to call it a will."

A good story is told of the late Lord Ashbourne, who was at one time Lord Chancellor of Ireland. Occasionally, says the Law Times, in the Court of Appeal, Lord Ashbourne would make up his mind to bring a case to an end before the rising of the Court, and it was highly instructive to watch the proceedings.

A junior who was not conscious of his humor stood up to open what appeared to be a short interlocutory appeal. Lord Ashbourne, after a sentence or two had been spoken, interjected. Now Mr. ————, why should we reverse the King's Bench on a point like this?"

"My Lord," rejoined the counsel, "there are six reasons why the order should be reversed."

"Then," said the president of the Court, "suppose we commence with your three best."

"No My Lord," said counsel, "I could not consent to that, because I have frequently succeeded in this Court upon my bad points."

Lord Ashbourne collapsed, and for once was unable to have his own way in the Court of Appeal.

(Minister calling on inmate of prison)—Remember, Mr. Kenney, that stone walls do not a prison make, nor iron bars a cage.

Kenney—Well, they've got me hypnotized, then; that's all.—Dallas News.

Judge Gundy, of Atchison, tells this lawyer story: An Irish lawyer was attorney for a man charged with murder. "Your honor, I

WEEKLY DIGEST.

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Abatement and Revival**—Bar.—A pending suit in equity in a federal court by a surety on a city contractor's bond for an adjustment of its claim on the fund in the hands of the city and as between it and creditors and claimants against the fund does not bar an action in a state court by a creditor of the contractor for a personal judgment on the bond.—Puget Sound State Bank v. Gallucci, Wash., 144 Pac. 698.

2. **Adverse Possession**—Laches.—The right of a municipal corporation to a street is not cut off by adverse possession; but where by laches of city officers an abutting owner has maintained in the street valuable improvements for the period of limitations, the city is estopped from opening the street.—Barton v. City of Portland, Ore., 144 Pac. 1146.

3. **Adultery**—Abetting by Husband.—That the husband of the woman abetted defendant in the commission of the act of adultery constituted no offense.—State v. Ayles, Ore., 145 Pac. 19.

4. **Agriculture**—Due Process of Law.—Laws 1909, p. 495, authorizing horticultural inspectors to disinfect or destroy trees, etc., held not to deny due process of law, by failing to adequately provide for a review of the inspector's decision in view of Laws 1913, p. 199, § 9.—Carstens v. De Sellem, Wash., 144 Pac. 934.

5. **Assignments for Benefit of Creditors**—

7.——Disbarment.—Under Rev. Codes, §§ 6393, 6410, the record of an attorney's conviction for a felony or a misdemeanor involving moral turpitude is conclusive evidence of the Supreme Court's duty to disbar him without notice.—In re Sutton, Mont., 145 Pac. 6.

8.——Relation.—Where the relation of attorney and client does not exist, the attorney is under no greater obligation to the party with whom he deals than one not an attorney.—In re Renehan, N. M., 145 Pac. 111.

9. **Audita Querela**—Remedy.—Where enforcement of a judgment which has been affirmed becomes inequitable, the judgment debtor should seek relief in the Supreme Court by motion, rather than by writ of audita querela.—Turknett v. Western College of New Mexico Conference of Methodist Episcopal Church, South, N. M., 145 Pac. 138.

10. **Bailment**—Voluntary Bailee.—A clothes cleaner is not a voluntary bailee of jewelry left in clothing sent to be cleaned, which comes into the hands of employes without its consent or knowledge.—Copelin v. Berlin Dyeworks & Laundry Co., Cal., 144 Pac. 961.

11. **Banks and Banking**—Bill of Lading.—Where a draft with a bill of lading attached was delivered to the bank as payee, which bank forwarded it for collection, and gave the depositor immediate credit, the proceeds in the hands of the correspondent bank belonged to the payee in the draft, as against a creditor of the depositor.—Scott v. W. H. McIntyre Co., Kan., 144 Pac. 1002.

12.——Interest.—Since the effect of the declared insolvency of a bank is to make deposits due, a depositor indebted to the bank on a demand note in excess of his deposit held entitled, under Rev. Codes, § 6043, to interest thereon from the date of the suspension until the date of the judgment on the note after allowance of the deposit as a set-off.—Williams v. Johnson, Mont., 144 Pac. 768.

13.——Notice.—A corporation held not liable to a bank for money borrowed by the corporation's president without authority, where the bank had notice through its agent that the loan was not for the benefit of the corporation.—State Savings & Commercial Bank v. Winchester, Cal., 145 Pac. 171.

14.——Payment.—Where a bank applied a debtor's balance to notes before they matured, and marked such notes "Paid," delivering them to the debtor, they were discharged; the act being in accordance with the understanding of the parties.—Commercial Nat. Bank of Salt Lake City v. Brinton, Utah, 145 Pac. 42.

15. **Beneficial Associations**—Agents.—The officers of a local lodge of a fraternal beneficial insurance association are, when in the discharge of their duties, agents of the order, and it is liable to a member negligently injured by the officers of a local lodge when initiating him.—

them can affect the validity of the note in the hands of a payee not chargeable with notice. —Sandell v. Norment, N. M., 145 Pac. 259.

18. **Brokers**—Oral Agreement. — An oral agreement employing plaintiff to act as defendant's sales manager, receiving 5 per cent of all land sales made by defendant's sales force or by plaintiff, held not void because not in writing, under L. O. L., § 808, subd. 8.—Sherman v. Clear View Orchard Co., Ore., 145 Pac. 264.

19.——Compensation.—A broker who had a contract for an agency for the sale of land cannot recover damages from the landowner who refused to go on, where the broker retained moneys collected from purchasers in excess of the expenses he incurred and the damages he suffered by reason of loss of time.—Whitcomb v. Sager, Wash., 144 Pac. 922.

20. **Carriers of Live Stock**—Contracts.—A provision of an interstate stock transportation contract that damage claims shall be in writing, verified and delivered to specified agents within ten days from the time the stock is removed from the cars is valid.—Howard & Callahan v. Illinois Cent. R. Co., Ky., 71 S. W. 442.

21. **Carriers of Passengers**—Negligence per se.—A street car passenger held not negligent as a matter of law in going to the closed vestibule while the car was approaching her station. —Kemp v. Portland Ry., Light & Power Co., Ore., 145 Pac. 274.

22.——Protection.—Where plaintiff was assaulted by defendants' ticket agent when endeavoring to induce him to return plaintiff's change for ticket purchased, plaintiff was a passenger to whom the carrier owed a duty of protection from unlawful assaults by employes. —Bledsoe v. West, Mo., 171 S. W. 622.

23. **Chattel Mortgages**—Bulk Sales Law.—Where a chattel mortgage on a stock of goods provided that the mortgagors could sell in the usual course of business, paying each week a certain per cent of the gross proceeds on the mortgage debt, it was not void per se, but its validity depended on the good faith of the contracting parties.—Cauthorn v. Burley State Bank, Idaho, 44 Pac. 1108.

24. **Commerce**—Transactions in.—A contract made in Illinois for shipment of animals to a point in Kentucky, being an interstate contract, is governed exclusively by federal laws, though in conflict with the state Constitution and laws. —Howard & Callahan v. Illinois Cent. R. Co., Ky., 171 S. W. 442.

25. **Constitutional Law**—Blue Sky Law.—An ordinary taxpayer cannot question the constitutionality of the Blue Sky Law, where the funds necessary to carry the act into effect would be derived from contributions and license fees imposed on corporations.—McKinney v. Watson, Ore., 145 Pac. 266.

26.——Bulk Sales Act.—The Bulk Sales Act is not class legislation.—Nolte v. Winstanley, Ariz., 145 Pac. 246.

27.——Class Legislation.—Laws 1913, c. 120, p. 356, § 4, subd. 7, authorizing creation of game preserves, held not obnoxious to the constitutional inhibition against class legislation.—Cawsey v. Brickey, Wash., 144 Pac. 938.

28.——Foreign Corporation.—Laws 1913, p. 326, prohibiting a foreign corporation from doing a savings and loan business within the state, does not deny the equal protection of the laws to such corporation.—State v. Merrill, Wash., 144 Pac. 925.

29. **Contracts**—Consideration.—An agreement by the mother, while living with the husband and father, to continue to support the child, instead of giving it away, is not a valid consideration for a contract by a third person to compensate the mother therefor.—Poetker v. Lowry, Cal., 144 Pac. 981.

30.——Evidence.—Declarations by the members of a family that the property of the family was accumulated by them and held in common alike, did not tend to prove a written contract

pay money with an option to pay in bonds, and recovery could be had, without alleging or proving the value of the bonds.—Beckwith v. Sheldon, Cal., 145 Pac. 97.

32. **Corporations**—Conduct of Affairs.—The majority of the stockholders of a corporation must determine how its affairs are to be conducted, and to whom and under what restrictions the management of such affairs shall be intrusted; but the right of such majority as to a contract between the corporation and directors personally interested therein is not absolute.—Beha v. Martin, Ky., 171 S. W. 393.

33.——Inspection of Books.—A stockholder held entitled, under a by-law of the company, to inspect its books to secure information for a rival corporation.—State v. Bucklin, Wash., 145 Pac. 58.

34. **Counties** — Compensation of Officers.— County commissioners cannot increase or decrease the maximum or minimum compensation of county officers in anticipation of the adoption of a constitutional amendment.—Ward v. Holmes, Idaho, 144 Pac. 1104.

35. **Criminal Law**—Arrest of Judgment.—Accused cannot contend that the court lost jurisdiction to enter the judgment from which he appealed by setting aside a former judgment on his own motion to enable him to move in arrest of judgment.—Vincent v. State, Ariz., 145 Pac. 241.

36.——Instructions.—Where the court properly charged that conviction of statutory rape could be had upon the uncorroborated testimony of the prosecutrix, accused cannot complain that the jury were not also charged to weigh her testimony with the other testimony, where he requested no such charge.—State v. Vinn, Mont., 144 Pac. 773.

37. **Damages**—Measure of.—The measure of damages for a city's refusal to permit meals to be furnished to city prisoners pursuant to contract is the difference between the cost of production and the contract price pending the contract.—Rogers v. Oklahoma City, Okla., 145 Pac. 357.

38. **Death**—Action for.—Where the gist of an action by parents for the death of a child is the negligent failure to furnish props in a mine, the action must be held to come within the Coal Mining Act, rather than the General Damage Act, as the former act is the only act which specifically gives a right of action for negligence in failing to furnish props.—Rocky Mountain Fuel Co. v. Koviacs, Colo., 144 Pac. 863.

39.——Measure of Damages.—The measure of recovery for death under Employers' Liability Act, § 4, is the pecuniary loss sustained, and not for deprivation of comfort, society, support and protection.—Fisher v. Portland Ry., Light & Power Co., Ore., 145 Pac. 277.

40. **Dedication**—Reference to Plat.—Persons to whom property was conveyed by reference to a plat, which attempted to dedicate the streets to the public, adopt the dedication by accepting the conveyance.—City of Caruthersville v. Huffman, Mo., 171 S. W. 323.

41. **Divorce**—Evidence.—In a suit for divorce, findings of incompatibility, refusal of the parties to live together as husband and wife, and that it would be conducive to no good to compel them to longer recognize the marriage held insufficient to sustain a decree of divorce.—Turner v. Turner, Wash., 144 Pac. 689.

42.——Support and Maintenance.—Where, in connection with divorce proceedings, a settlement is made between the parents, whereby the father makes provision for the support of minor children, which is accepted by the mother as satisfactory, he is no longer liable in an action by her for their support and maintenance furnished by her.—La Rue v, Kempf, Mo., 171 S. W. 588.

43. **Embezzlement**—Deputy Sheriff.—Appropriation by a deputy sheriff of taxes collected is

Const. art. 2, § 24, as taking property without compensation.—Welker v. Annett, Okla., 145 Pac. 411.

45.——Estoppel.—Where plaintiff's grantors had acquiesced in the use of part of the land (originally an unoccupied railroad grant) for an irrigation reservoir by an individual having the right of eminent domain, plaintiff was estopped to maintain ejectment as to the rights acquired by the owner of the reservoir by actual use of the land for such purposes.—Edwards v. Roberts, Colo., 144 Pac. 856.

46.——Evidence.—Where part of a tract of land is taken for a railroad right of way, damages to the remainder is recoverable, and evidence that the right of way would probably cast flood waters on the remaining land is admissible.—Colusa & H. R. Co. v. Glenn, Cal., 144 Pac. 993.

47.——Grading Streets.—A city making an original grade of a dedicated street does not take or damage private property, where the grading is done wholly within the street and there is no negligence in doing the work.—Schuss v. City of Chehalis, Wash., 144 Pac. 916.

48. **Escrow**—Delivery.—Under Rev. Codes, §§ 4596, 4599, providing that a grant, or a grant in escrow, does not vest the interest transferred until delivery of the instrument, an option contract accompanied by a deed in escrow does not bar dower, where the husband died before delivery of the deed by the depositary.—Tyler v. Tyler, Mont., 144 Pac. 1090.

49. **Estates** — Mechanics' Lien. — Owner's check, drawn on her bank, with instructions to pay her contractor on release of liens, held not an estoppel in favor of plaintiffs, who had furnished work and materials and had filed liens and notices therefor.—Wade v. City and County Bank, Cal., 145 Pac. 145.

50. **Estoppel**—Acceptance of Deed.—Where a partner, who has sold his interest to B, without expressly rejecting a tender back of such interest, joins with his former partners in selling the firm property and receives his share of the proceeds and procures a judgment that B has no interest, he is estopped to deny acceptance of the tender.—Haughton v. Soule, Kan., 144 Pac. 995.

51. **Evidence**—Book Entries.—Entries in the regular course of business are admissible only when the entrant is dead, insane, beyond the jurisdiction, or unable to recall the facts by referring to the entries.—Shepherd v. Denver & R. G. R. Co., Utah, 145 Pac. 296.

52. **Execution**—Certificates of Stock.—Where a sheriff's return of levy of execution on corporate stock and the certificates of the president of the corporation were filed in court, a subsequent purchaser of the stock took with knowledge of the levy.—Ellis v. Gibbons, Colo., 145 Pac. 285.

53. **Executors and Administrators**—Abuse of Discretion.—Conceding that it was discretionary with the court to order security from legatees to save harmless the plaintiff in a pending suit, held that it was an abuse of discretion not to require security where on account of the dissipation of the funds the plaintiff, if successful, would be embarrassed in the collection of his judgment.—Oles v. Macky's Estate, Colo., 144 Pac. 891.

54.——Evidence.—In an action by an administrator to recover the value of furniture belonging to his intestate which the intestate's daughter gave to defendant, evidence held not to show that an award of $75 was insufficient.—Woolley v. Taylor, Utah, 144 Pac. 1094.

55. **Extortion**—Defined. — One who extorts money from another by a threat to accuse the other of a crime is guilty of extortion regardless of the other's guilt.—Lee v. State, Ariz., 145 Pac. 244.

56. **Frauds, Statute of**—Performance.—Full performance of an oral contract by one of the parties does not take the contract out of the

rigation reservoir extending over part of the land depended on acts of Congress and not only on an agreement, the statute of frauds was not available to defeat defendant's right.—Edwards v. Roberts, Colo., 144 Pac. 856.

58. **Fraudulent Conveyances**—Bulk Sales Law.—Where a baker sold his stock in trade and fixtures, the sale of the stock being void under the Bulk Sales Act, the sale of the fixtures may nevertheless be valid.—Nolte v. Winstanley, Ariz., 145 Pac. 246.

59.——Conveyance to Wife.—When a debtor conveys property to his wife when insolvent, or if the transaction will render him insolvent, the husband and wife must establish by clear and satisfactory evidence that the transaction was made in good faith, for a valuable consideration, without intent to hinder, delay, or defraud creditors.—Thuringer v. Trafton, Colo., 144 Pac. 866.

60. **Game**—Excessive Slaughter. — Though county game commission had no power to forbid "feeding" grounds to entice game, held that in creating game preserve it properly considered the fact that such "feeding" contributed to an excessive slaughter of game.—Cawsey v. Brickey, Wash., 144 Pac. 938.

61. **Indemnity**—Stranger.—Where a stranger indemnifies himself a surety company which becomes bankrupt and is dissolved without paying, the surety's representative cannot enforce the indemnity.—Hasbrouck v. Carr, N. M., 145 Pac. 133.

62. **Indians**—Allotments.—Act Cong. April 21, 1904, c. 1402, 33 Stat. 204, granted to the allottees not of Indian blood, or their heirs, power to convey allotments, except the homestead, while the allottee lived and lands of minors during minority.—Bradley v. Goddard, Okla., 145 Pac. 409.

63. **Infants**—Guardian ad Litem.—An objection to a defect in the appointment of a guardian ad litem cannot be raised by objection to the admission of the appointment in evidence, where the answer was a general denial.—Everart v. Fischer, Ore., 145 Pac. 33.

64. **Insurance**—Extension.—Where the assignee of the insured requests an extension of time to pay a premium upon a life insurance policy, and the company grants the request, upon certain conditions complied with, the company cannot afterwards impose additional conditions.—Rouleau v. Continental Ins. & Inv. Co., Utah, 144 Pac. 1096.

65.——Permits.—Where defendant's agent issued a policy to plaintiff, the insurer could not repudiate a permit to remove the property, issued by such agent after his discharge, in the absence of notice to plaintiff.—Goldstein v. Pacific Home Mut. Fire Ins. Co., Ore., 145 Pac. 267.

66. **Larceny**—Severance.—Where a wrongdoer severs property from the freehold, he thereby converts it into a chattel, and if he removes it with a felonious intent he is guilty of larceny without reference to the dispatch employed in such removal.—State v. Donahue, Ore., 144 Pac. 755.

67. **Limitation of Actions**—Accrual of Action.—Where a city in violation of certain ordinances lowered a curb grade below the established grade in 1904, property owner's suit in 1912 to restrain the city from then compelling the lowering of an old sidewalk to a new grade was not barred by limitations.—Ludwigs v. City of Walla Walla, Wash., 145 Pac. 193.

68.——Nonsuit.—When a nonsuit is granted for any reason, an action fails otherwise than on the merits, within Comp. Laws 1907, § 2893, relative to bringing a new action within one year after an action so fails.—Williams v. Nelson, Utah, 145 Pac. 39.

69. **Mandamus**—Parties. — In a mandamus proceeding to compel the board of directors of an irrigation district to issue and deliver war-

mortgage on the remainder after sale of part of mortgaged chattels, with the senior mortgagee's consent, but without waiving lien, and who later took an assignment of the senior mortgage, could not invoke the doctrine of marshaling securites as against equities of the buyers.—Keasler v. Wray, Tex., 171 S. W. 534.

71. **Master and Servant**—Contributory Negligence.—Contributory negligence does not defeat a recovery under the federal Employers' Liability Act, as amended by Act April 5, 1910, but reduces damages.—Chadwick v. Oregon-Washington R. & Navigation Co., Ore., 144 Pac. 1165.

72.——Federal Employers' Liability Act.—Where an engineer, directed, while operating an interstate train, to tow to a station a defective engine on a passing track, was injured by the negligence of the engineer in charge of the defective engine, the railroad company was liable under the federal Employers' Liability Act.—Pfeiffer v. Oregon-Washington R. & Nav. Co., Ore., 144 Pac. 762.

73.——Respondeat Superior.—An employe of a public garage held acting within the scope of his authority where he used, against orders, an automobile, to get batteries from an electric company.—Gibson v. Dupree, Colo., 144 Pac. 1133.

74.——Signals.—Trainmen, when approaching track repairers, must signal them so that they may leave the track in time to avoid injury.—Sagara v. Chicago, R. I. & P. Ry. Co., Colo., 144 Pac. 881.

75. **Mines and Minerals**—Assessment Work.—Assessment work performed on mining claims after the expiration of the year for which the work was done, and after the claims had been relocated. is ineffective to restore the rights of the original locators.—McDonald v. McDonald, Ariz., 144 Pac. 950.

76. **Monopolies**—Restraint of Trade.—A contract whereby a retail ice dealer agreed to purchase all of his ice from a certain manufacturer so long as the latter could supply his demand held to be a "conspiracy in restraint of trade" within Rev. St. 1911, art. 7798, subd. 1.—Wood v. Texas Ice & Cold Storage Co., Tex., 171 S. W. 497.

77. **Mortgages**—Primary Fund.—Where a husband owning 10 acres in his own right and 20 acres in trust for another mortgaged the whole and then conveyed the 10 acres to his wife, subject to the mortgage, and it was agreed between them that the 20 acres should not be liable for the mortgage debt, the 10 acres was the primary fund, so that the mortgagee's release of the 20 acres did not prevent a subsequent foreclosure as to the 10.—Cassinella v. Allen, Cal., 144 Pac. 746.

78. **Municipal Corporations** — Civil Service Rules.—An ordinance providing a position to be filled under civil service rules does not create a contract between the city and the person selected to fill the position or give such person a life tenure so as to preclude his removal on the abolition of the position.—State v. City of Seattle, Wash., 144 Pac. 695.

79.——Torts.—Laws 1905, c. 67, § 1, does not render a city liable for a tort of its officer, unless such act be done by authority of the city or in execution of its orders.—Baca v. City of Albuquerque, N. M., 145 Pac. 110.

80. **Navigable Waters**—Obstruction. — Hindrance to navigation from booms and sorting works for logs held merely an incident to the reasonable use of the stream for floating and securing logs.—Cameron Lumber Co. v. Stack-Gibbs Lumber Co., Idaho, 144 Pac. 1114.

81. **Pardon**—Parole.—A parole does not va-

title to which was taken in the name of R, was held under the terms of an agreement for division of profits held maintainable, even assuming that such agreement created a partnership.—Donahoe v. Rogers, Cal., 144 Pac. 958.

84. **Principal and Surety**—Pledge.—Where security pledged as personal indemnity for the surety is also pledged for payment of the debt, discharge of the surety cannot deprive the creditor of a claim on the security for payment of the debt.—Hasbrouck v. Carr, N. M., 145 Pac. 133.

85. **Prohibition**—Adequate Remedy.—A petitioner, for leave to sell under a power in a trust deed in a suit against a corporation for goods sold, in which a receiver was appointed, who is not technically an intervener, and hence has no right to appeal from the order appointing the receiver, has no adequate remedy at law defeating his right to a writ of prohibition to set aside the appointment.—Elliott v. Superior Court of San Bernardino County, Cal., 145 Pac. 101.

86. **Quieting Title**—Equitable Interest.—Action to have it adjudged that land was held pursuant to agreement between plaintiff and R for a division of the profits on land purchased by plaintiff with R's money, held not one to quiet title within the rule that such action may not be maintained by the holder of an equitable interest against the holder of the legal title.—Donohoe v. Rogers, Cal., 144 Pac. 958.

87. **Railroads**—Negligence.—While a railroad company is not bound to maintain a fence to keep out cattle running at large, it is liable where it allows food to accumulate upon its right of way so as to attract such cattle into a place of danger.—St. Louis, I. M. & S. Ry. Co. v. Wilson, Ark., 171 S. W. 471.

88.——Station Agent.—That a station agent and section foreman of a railroad company assumed considerable authority did not warrant an inference that they could lease or permit the use of the right of way for dwellings or give away the company's materials.—Mirodias v. Southern Pac. Co., Nev., 145 Pac. 912.

89. **Rape**—Evidence.—In a prosecution for statutory rape, evidence of acts of intercourse prior to the date of the act charged in the information is admissible in corroboration.—State v. Vinn, Mont., 144 Pac. 773.

90. **Receiving Stolen Goods**—Ingredients of Offense.—To establish the offense of receiving stolen goods, four things are necessary: (1) That the property was stolen; (2) that either the thief or a third person delivered the goods to defendant; (3) that at the time defendant received the property he knew it was stolen, or that he received it under such circumstances that a reasonable person of ordinary observation would have known that it was stolen; (4) that he received it for his own gain or to prevent the owner from again possessing it.—State v. Janks, Idaho, 144 Pac. 779.

91. **Replevin**—Interest.—Where there was no proof that the property had any rental value or that plaintiff had sustained any special damage because deprived of its use, a judgment for him should be for the value of the property with interest from the date of its wrongful seizure until the date of the judgment.—Dillon & West v. Grutt, Nev., 144 Pac. 741.

92. **Sales**—Conditional Sale.—Where a conditional buyer of machinery executed a mortgage to secure the assignee of the seller for the price and other debts, and the mortgage recognized that the conditional sale was in force and that the title had vested in the assignee, he could as-

those delivered were mangel-wurzels of half-value, the petition was sufficient to sustain a judgment for plaintiff for the difference in value. —Wamhoff v. Newcomer, Wyo., 144 Pac. 778.

95.——Property in Existence.—There can be no executed sale unless the thing sold then has an actual or potential existence, and is in or is to come out of something in the possession or control of the seller.—North Idaho Grain Co. v. Callison, Wash., 145 Pac. 232.

96.—Rescission.—Where defendant sold a traction engine, representing it to be like an engine which had won numerous prizes, but the engine delivered was of a different pattern, the purchaser may rescind, though defendant honestly believed that his representation was true. —Lathrop v. Maddux, Colo., 144 Pac. 870.

97. **Sheriffs and Constables**—Stipulation.—Where a sheriff was not a party to a stipulation that, if an attachment was quashed, plaintiff should have time to appeal and file a supersedeas, the sheriff was under no duty to hold possession after the attachment was quashed and demand made for surrender.—Bank of Lind v. Coss, Wash., 145 Pac. 207.

98. **Specific Performance**—Abatement. — A purchaser from the husband held entitled to enforce specific performance against him, and receive an abatement in the agreed price to the extent to which the value of the title obtained was diminished by the wife's outstanding interest.—Williams v. Wessels, Kan., 145 Pac. 856.

99. **States**—Appropriations.—Where the total expenditure for the penitentiary was less than the appropriation, the state was not damaged because warrants for the penitentiary were paid out of funds derived from the sale of brick made by the convicts, which were improperly deposited as a revolving fund for the penitentiary.—State v. West, Ore., 145 Pac. 15.

100. **Taxation**—Competitive Bids. — Under Rev. St. 1898, § 2629, making a tax deed prima facie evidence of facts recited, a deed, reciting that the property was offered to the highest bidder and sold to the county for a sum which was the highest and best bid, shows the county to have been a competitive bidder contrary to section 2623, and the deed is void.—Wall v. Kaighn, Utah, 144 Pac. 1100.

101.——Improvements.—The dam and gates in the outlet canal of a reservoir belonging to a mutual irrigation company are not taxable apart from the water rights, since they are not improvements on land, but are parts of the canal which is under the Constitution exempt from separate taxation.—Kendrick v. Twin Lakes Reservoir Co., Colo., 144 Pac. 884.

102.——Obligation of Contracts.—Where at the time of issuance of a certificate of tax sale, the law did not require notice, the legislature had authority to change the remedy for enforcement of certificate contracts, provided the obligation of the contract was not impaired.—Rice v. Rock, Idaho, 144 Pac. 786.

103. **Telegraphs and Telephones**—Franchise. —Under franchise, telephone company held required to remove and replace its wires to allow passage of a house being moved, without any charge.—Home Telephone & Telegraph Co. of Portland v. Moodie, Ore., 145 Pac. 635.

104. **Trade-marks and Trade-names**—Unfair Competition.—Use of name, S. Company, by persons, none of whom were named S, but who, under such name, engaged in the same business as C. & S., a long-established concern, held unfair competition, though S. Company was located in the S. building.—Crutcher & Starks v. Starks, Ky., 171 S. W. 433.

105. **Trial**—Verdict.—Where, in an action for $1,700 as the value of a horse, the only testimony of value is that of the owner that the horse was worth $1,500, a verdict for "the sum of ($12.00) twelve hundred" will be construed to be a verdict for $1,200.00.—St. Louis & S. F.

chasing property in his wife's name, it must have been understood, at the time title was taken, that the wife was to hold it as trustee. —Coe v. Coe, Ore., 145 Pac. 674.

108. **Vendor and Purchaser**—Damages.—The measure of damages for failure to convey land for a stipulated price is the difference between the value of the land at the time set for conveyance and the contract price.—Francis v. Brown, Wyo., 145 Pac. 750.

109.——Demurrer.—A petition declaring on a purchaser's promise to pay the balance in cash in three years, instead of in stock, if within that time a cement plant had not been established, held not demurrable for failure to state a cause of action.—Delgarno v. Middle West Portland Cement Co., Kan., 145 Pac. 823.

110.——Equitable Interest.—A purchaser in possession of land under a contract of purchase calling for pyament in installment has an equitable interest in the land.—Stritzel-Spaberg Lumber Co. v. Edwards, Mont., 144 Pac. 772.

111.——Installments.—A vendor, who grants time to the purchaser for the payment of installments, may, on the default continuing, demand payment of the price and give notice of his purpose to terminate the contract for further default.—Suburban Homes Co. v. North, Mont., 145 Pac. 2.

112.——Notice.—A purchaser from a person other than the possessor is chargeable with notice of such right of the possessor as an inquiry would have disclosed.—McBee v. O'Connell, N. M., 145 Pac. 123.

113.——Rescission.—An agreement by the vendor to render a portion of the land irrigable held to be collateral to the contract of sale, so that its breach did not entitle the vendor to rescind. —Cheney v. Bierkamp, Colo., 145 Pac. 691.

114. **Venue**—Jurisdiction.—Where an action was brought against nonresidents and their property attached, and also against a resident of another county, and there was no evidence to sustain a cause of action against the nonresidents, the court had no jurisdiction over the resident.—Hembrow v. Winsor, Kan., 145 Pac. 837.

115. **Waters and Water Courses**—Appropriation.—Division of the year into direct irrigation and storage seasons is not a matter for the courts; use under an appropriation being limited as to time only by necessity.—Comstock v. Larimer & Weld Reservoir Co., Colo., 145 Pac. 700.

116.——Flood Waters.—A complaint to establish rights in flood waters, which shows that for many years plaintiff maintained a dam and a ditch and used the waters, and that recently defendant diverted the same, states a cause of action.—Daggs v. Howard Sheep Co., Ariz., 145 Pac. 140.

117.——Irrigation.—Act Cong. July 26, 1866, § 9, and Amendment of July 9, 1870, § 17, operate as a grant of the right of way for the construction of a reservoir for the irrigation of lands owned by the United States and unoccupied in 1866 whenever the right to such reservoir shall have accrued under the local customs, laws or decisions of courts.—Edwards v. Roberts, Colo., 144 Pac. 856.

118.——Riparian Owner.—A riparian owner, damming a stream, is not bound to anticipate unprecedented storms or rainfalls.—Radburn v. Fir Tree Lumber Co., Wash., 145 Pac. 632.

119. **Wills**—Reversion.—Where testator devised a house and lot to a son for life, with reversion to testator's heirs, and divided the balance of his property among his other children, the other children are to be charged in the distribution of the reversion with the amounts they received under the will under Ky. St. § 1407.—McIlvaine v. Robson, Ky., 171 S. W. 413.

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ST. LOUIS, MO., APRIL 9, 1915.

CORPORATION AND STOCKHOLDERS DISTINGUISHED IN CONSTRUCTION OF STATUTES RELATING TO LIABILITY OF THE LATTER FOR CORPORATE INDEBTEDNESS.

The Supreme Court of Oklahoma, in majority and minority opinions, treats in quite an interesting way the question, whether amendment of banking laws bringing trust companies under the rules of purely banking business also brings the shareholders of the latter under the same rule of liability. Lankford v. Menefee, 145 Pac. 375.

The law for the incorporation of trust companies made each stockholder liable for debts of the corporation to the extent only of double the amount that is unpaid upon the stock held by him, while as to banks doing a purely banking business each stockholder is liable for company debts to the extent of the stock subscribed for by him.

The trust company act authorized a trust company to do business as such and also a banking business, and, indeed, it would seem that the act contemplates that it should do both kinds of business.

These laws were in existence while Oklahoma was a territory and after its admission as a state there was a general revision of its banking laws and by that revision it was provided that "the shareholders of every bank organized under this act shall be additionally liable for the amount of stock owned and no more."

Were the matter left at this point, it made liable differently than as expressed in the law for its incorporation, howsoever inconsistent this law would appear to be as compared with other existing law with regard to corporations doing a banking business.

But the revision statute says that "no bank, except those that have complied with or that may be organized under the laws of this state relating to trust companies shall engage in any business other than as authorized by this act." And further in this revision statute there is spoken of the capital stock of banks and trust companies in the state being subject to assessment for a depositors' guaranty fund. And, indeed, all through this revision statute trust companies and banks are referred to as all coming under it in their right to carry on business, none of them being allowed "to receive money upon deposit or transact a banking business except as authorized by this act, or by the laws relating to trust companies."

It was said by dissenting opinion, that as the law formerly stood a trust company could not receive money upon deposit without complying with all the provisions of the general banking law, but it was not claimed that such compliance increased the stockholders' liability under the revision. The dissenting judge claims it could receive money on deposit without complying with the revision act, but could not engage in the banking business without thus complying, as "otherwise there would be no law governing the banking carried on by a bank organized under the trust company law."

We must confess that the most we can make out of this, unless the dissenting

There must be supposed something of strabismus in the legislative eye, that would hold a stockholder in a trust company to a less strict liability as to trust funds than as to ordinary debts arising in a banking business. And this being so, courts ought to be inclined to regard future legislation as meaning to put this aside, if fairly it can be construed this way.

But the majority lay stress upon the fact of the double liability under the new law expressly applying to "shareholders in a bank organized under this act," while the act alludes to banks and trust companies organized under existing laws. Surely, however, it ought to be thought that the new act was intended to cover the entire subject not only of organizing banks thereafter, but of permitting any banking business to be done except as subjecting stockholders to penalties for its debts according to the rule of double liability.

This would have made no change under the old law as to purely banking business, which did not embrace trust company features. Merely out of caution this might have been stated in the new law, and to prevent any controversy on this subject between new and old banks.

But, if this was the intent, it also manifests purpose as to every institution carrying on a business, of which banking is a part, under the new law.

If a trust company could not be joined in with others because there was not behind its corporate debts the same double liability as with banks under the old and the new law, the new law, conferring a benefit in its guaranty features, may be to operate such liability, if, along with benefits received, that is to say the guaranty fund above spoken of, the field of activity is practically closed to non-acceptors of the provisions of a new law of general operation. All a court has to ask itself is whether such law intended that the old difference in shareholder liability should continue to exist. It does not seem sufficient to say that the new law was aimed at control of corporations and not at shareholders at all. While a corporation may sue and be sued, contract and be contracted with, yet also we know that, upon the whole, these powers and responsibilities work interchangeably for its benefit, and they are not intended to enable shareholders, to whom, in final analysis, the corporation belongs, to take advantage where estoppel would operate against another. The rule of law and its construction that works out practically is more preferred now than formerly.

NOTES OF IMPORTANT DECISIONS

BILLS AND NOTES—PAYMENT OF NON-NEGOTIABLE DRAFT PRECLUDING RECOVERY FROM HOLDER.—In United States v. Bank of New York, 219 Fed. 648, decided by Second Circuit Court of Appeals, it is held that where the Secretary of the U. S. Treasury pays a draft purporting to have been drawn on him by an American Consul, which draft is upon a forged signature of such consul, it cannot recover from a *bona fide* holder of such draft, whether it be negotiable or not.

The opinion reaffirms the rule announced in Price v. Neal, 3 Burr. 1354, decided in 1762, which established the principle that the drawee of a draft, which pays the same, cannot compel repayment on discovering the drawer's name has been forged, and it is pointed

an individual from the unauthorized and fraudulent acts of its agents and the case of United States v. National Exch. Bank, 214 U. S. 302, 53 L. ed. 1004, 16 Ann. Cas. 1184, is cited in support of such claim. But the Second Circuit Court of Appeals said the ruling there was not in a case where the signature of the drawer was forged, but only that of payee and the rule in Price v. Neal is inapplicable to such cases, there being at common law no obligation on drawee to know the signature of payee or indorser.

It was said, however, that in this case the draft was upon a condition that it be charged "to account for relief of seamen and balance of salary." The court said it was unnecessary to determine whether the draft was conditional and therefore non-negotiable, because the doctrine in Price v. Neal, applied as well in one as the other case, going, as it does, on the theory that: "A drawee knows the signature of his drawer and that it is negligence in him if he accepts or pays without satisfying himself respecting the genuineness of the signature."

It was further said: "The importance of the distinction between negotiable and non-negotiable paper grows out of the principle that the bona fide holder of negotiable paper takes free from equities, while the holder of non-negotiable paper takes subject to them. The act of payment follows the acquisition of the title by the holder, and it is the effect of the act of payment alone which is to be determined, and in determining it, it can make no difference whether or not the holder acquired the paper free from or subject to existing equities, and if it is not unconscientious for the holder of a negotiable bill who is paid on a forged signature of the drawer to retain the money paid him by the negligence of the payee, no more is it unconscientious in the holder of the non-negotiable bill who has been paid in the same way to retain what he has been paid."

This reasoning, if the whole theory of rightful retention is predicated upon conscientiousness on the part of the holder, is unassailable. But if it is not considered that a non-negotiable paper is to have currency like a negotiable paper the holder takes it in a different way

EFFICIENCY AS AN IDEAL.

All professions and business pursuits to be successful demand large measures of concentrated attention, sound qualifications, interest in work, fair treatment of one's associates as well as one's self, and an adequate system of general organization. In addition to these elements, there is implied some ideal of perfection toward which all activity is directed and from which substantial help may be had in establishing efficient relationships. The word efficiency interpreted in this or some similar way has a grand significance. It implies the necessary specialization without the sacrifice of those things which make life attractive. It includes kindness as well as firmness in its meaning.

We meet people every day who seem to possess this true efficiency. They accomplish results, and it makes no difference whether they are farm hands, railroad presidents, news boys, editors or lawyers. It is all the same. But there is another kind due to what is known as the "efficiency bug." Good natured business has in many instances been inoculated by the bite of this bug with a peculiar disease, the symptoms of which are numerous, but may be summed up as an effort to squeeze the last available atom of energy out of its representatives all the way down the line from the highest officials to the humblest employe.

All business has not been thus affected, however. Much of it has remained immune to the bite of this "bug," and operating under good counsel or by reason of some humane instinct, has kept on the path of true progress, not measuring its dividends exclusively by the dollar mark, but reading into them the loyalty of its personnel besides.

to be blind to everything else. There probably remains with them, however, a glimmer of the idea that most of us are well satisfied to go along as we have been going and encourage the human nature that is rightfully ours. It is to be hoped that this glimmer will expand into a true light of understanding.

Reforms in legal procedure, or in legislation leading to a simplification of laws generally should without doubt be woven among the lines of sound "efficiency," but this does not mean that they should be shorn in their effect of everything save efficiency. There are other things that go to make up the relationships of human beings, and these are not recognized in a process, the sole object of which is to force more work out of yourself or others, and at the same time provide no way by which rightful ambition may be conserved.

The lawyer of large practice is of necessity an efficiency expert and he draws upon his most available sources of information, be they text books, reports of the decisions of courts, or memories built up of experience. But unless he has been obsessed by the word "efficiency," and all that it implies in its coldness, he does not overlook that greater "efficiency" which contains within it human qualities. Certainly if there is any field in which true efficiency can find effective application, it is within that scanned by lawyers. On this phase of the matter, Mr. A. H. Robbins in an item referring to Louis D. Brandeis, in the Central Law Journal for January 22nd, 1915, says: "There is opening a wide field of usefulness, as well as profit for lawyers in appearing for associated committees of citizens before the public service commissioners of our large cities and of some of the states."

A person may be productively engaged

ter of economy in motions. He may be persuaded that the greater the number of motions made in the shortest time and with the least effort, the greater the resultant efficiency. So far, good. No one will deny this as a principle of mechanics. If we were dealing with machinery and not with human beings, there would be no fault to find with this limited idea of efficiency.

As a result of this mechanistic system, the objective points become nothing but dividends. The human beings engaged, from the owner of the business to the janitor, are to be jerked out of the hole by "rule of thumb" methods, and be made into machines individually and collectively. There is absolutely no question but that they will become very efficient as such machines through this process of elimination. For process of elimination it is, in that it *tends* to result in stripping them of everything but mechanical perfection as workers. In this procedure there is no fear nor favor. The owner and managers put themselves under the same system and reap the same results relatively as everyone else connected directly or indirectly with the business.

But supposing our efficiency expert sees in his ideal something besides mechanics, will he object to the cultivation of easy, rhythmic motions and proper rest periods? No. He will on the contrary make these things largely his stock in trade. But he will do more. He will try to perceive wherein the workman best loves his work and in what manner he performs it with the greatest freedom. He will not despise the so-called "rule of thumb" methods, but will try to make the users of those methods efficient in them. He will encourage the expression of individuality in each workman so far as can be done in harmony with others and in harmony with the character of the business. He will encourage friendly sion? Clearly the answer is no. But it shows that compulsory efficiency in business or other peaceful pursuits is nothing more than human deficiency, although at first hand it may seem different. And, too, this ideal forever removes the holder of it from the chilling atmosphere of a business policy, the dominant idea of which is simply a tight-fisted squeezing of the productive sponge. HARVEY D. CHENEY.

Los Angeles, Cal.

SOME LEGAL NOTIONS OF MARK TWAIN.

By all the laws of heredity and environment Mark Twain should have been a lawyer. His father and paternal grandfather were both members of the profession. The father, John Marshal Clemens, practiced intermittently in half a dozen places, successively in Kentucky, Tennessee and Missouri. In Hannibal, where young Twain spent his boyhood, the father was known as "Judge" Clemens, and was for a time justice of the peace as well as a practicing attorney. Orion, an elder brother of Twain's, followed in the footsteps and profession of the father, but Twain himself seems to have had no inclination in that direction, strong as his environment must have impelled him at times.

It was with Orion that Twain made the memorable trip by over-land stage to Nevada. The passengers were each restricted to twenty-five pounds of baggage, and Twain, who found the usual amount of humor in this seeming prosaic fact, relates that "my brother, the secretary, took along about four pounds of United States statutes and six pounds of Unabridged Dictionary." During the trip the migrating humorist "read law." The coach was half-filled with a three-days' accumulation of mail reading the statutes and the dictionary, and wondering how the characters would turn out." For years afterward the brothers were intimately associated. Orion held his government secretaryship for a while, but finally opened up a law office. Twain did not again join him in his legal studies; nor does he seem to have been profoundly impressed with Orion's fitness for a career at the bar. In a letter written during the Nevada sojourn, he "wonders if his (Orion's) law business is going satisfactorily," and later, in 1875, writing to his mother and sister, in melancholy complaint of Orion's vagrant shortcomings, he says—"I can't 'encourage' Orion. I can't encourage him to try the ministry. I can't conscientiously encourage him to do anything... One can't 'encourage' quicksilver, because the instant you put your finger on it, it isn't there. No, I am saying too much. He does stick to his literary and legal aspirations, and he naturally would elect the very two things which he is wholly and preposterously unfitted for."

Referring to a still later period, Twain's biographer, Albert Biglow Paine, tells us that Orion "had prospected insurance, mining, journalism, his old trade of printing, and had taken down and hung up his law shingle between each of these seizures."

Possibly it was the indifferent success of his father at the law and, later, the successive failures of his brother, Orion, that smothered all ambition or interest that Twain himself may have had in the direction of the profession. It is certain that though he was himself in turn a printer, pilot, reporter, prospector, newspaper correspondent, senatorial secretary, lecturer, traveler, inventor, publisher, and author, he never indulged in even a mild flirtation with the law. Yet his life was closely bound up with the profession and its members. In 1899 he was elected a member of the Lon-him he said: "I believe you keep a lawyer. I have always kept a lawyer, too, though I have never made anything out of him. It is service to an author to have a lawyer. There is something so disagreeable in having a personal contact with a publisher. So it is better to work through a lawyer—and lose your case."

Twain's books abound in similar jibes at the lawyers. Indeed, no other writer has turned to the environment of the law so frequently to find material with which to embellish a joke or point a moral. Moreover, it would be impossible to point out the many instances when he turned the brilliant illumination of his sarcasm on dark and unwholesome places in our law courts. He was never done praising our jury system as the "palladium of our liberties." He is not quite sure what a "palladium" is, but is inclined to think it a "good thing," since three hundred murders had been committed in the state of Nevada, and the severest penalty inflicted had been eight months in jail! He pretended to think our jury system "superior to any in the world," and assured an English audience that its efficiency is "only marred by the difficulty in finding twelve men every day who don't know anything and can't read." He was likewise lost in wonder of "the insanity plea that would have saved Cain." And so on to the end of the long catalogue of abuses that prevail in the administration of our criminal law.

Quite as frequently, however, he had in mind nothing more serious than the achievement of a playful hoax. In "Roughing It," he reports the case of Hyde v. Morgan. The plaintiff owned a ranch in the Washoe District, Nevada. On the mountain side, immediately above the plaintiff was located is a hoax, and results in the discomfiture of the plaintiff's attorney, the uninitiated victim. No less amazing is the trial of the Siamese twins, Lugia and Angelo, for assault and battery, all of which is set down with much precision and absurdity in the "Extraordinary Twins." It was conceded that somebody, at a public temperance meeting, had soundly kicked the complaining witness, but whether the crime had been committed by the half of the twin that was Lugia or by the half that was Angelo was the perplexing problem that the court attempted to solve. It is a most extravagant tale, not highly regarded by literary critics, but not without interest and humor for the lawyer.

Twain knew well the dramatic interest of a murder trial. In fact, he achieves a climax in three of his books with a murder trial: "The Trial of the Vagabond, Muff Potter," in "Tom Sawyer," that of the fantastic twins, Lugia and Angelo in "Pudd'nhead Wilson," and of Laura Hawkins in the "Gilded Age."

In the "Gilded Age" appears a statement of Twain's literary creed in this respect, though the sentence appears in a chapter generally credited to Charles Dudley Warner, who collaborated in the writing of this book: "There is no enjoyment so keen to certain minds as that of looking upon the slow torture of a human being on trial for life, except it be an execution; there is no display of human ingenuity, wit, and power so fascinating as that made by trained lawyers in the trial of an important case, nowhere else is exhibited such subtlety, acumen, address, eloquence."

Twain knew how to make the most of this dramatic interest. In fact, his trials are altogether dramatic, when not joyously ab-administration of the oath to a witness; yet, if it added a touch of the dramatic, the witness kissed the Book. Nor does he seem to have cared very much whether the jurisdiction of a murder trial was in the county court or the circuit court in the State of Missouri; he could make it as thrilling in one as the other. Consequently he never bothered to verify his court procedure. He may have reasoned that when his variations from legal procedure were observed, no one would ever be quite sure that he was not purposely indulging in the innovation or perpetrating a hoax. He knew that the doubt whether a writer is making a mistake or a joke is a cloak broad enough to cover all the sins of a humorist. He realized this truth and prepared his readers to realize it also when he wrote the introductory, "Whisper to the Reader" in "Pudd'nhead Wilson."

"A person who is ignorant of legal matters is always liable to make mistakes when he tries to photograph a court scene with his pen; and so I was not willing to let the law chapters of his book go to press without first subjecting them to rigid and exhausting revision and correction by a trained barrister—if that is what they are called. These chapters are now right in every detail, for they were rewritten under the immediate eye of William Hicks, who studied law part of a while in Southeast Missouri thirty-five years ago and then came over here to Florence for his health and is still helping for exercise and board in Macaroni Vermicelli's horse-feed shed—"

After that introduction the lawyer-reader never knows whether the author has made a mistake or is simply having fun with him. As he reads the book he is quite sure that the legal chapters could have been written by a livery stable keeper, but then the author meant them to seem so. Did he not say as much at the very outset?

"Tom Sawyer," however, presents no such violent sport with legal conventions as

to the jury, court, and audience, which without further ado clears the defendant and fixes the crime upon Indian Joe, but this performance is rather mild for Twain.

For extravagant fancy, however, and flagrant disregard of legal traditions, the trial of Laura Hawkins in the "Gilded Age" has no equal in all literature. Prospective jurors are challenged for cause because they can read, and the challenge is sustained. The court, however, is not so certain that an illiterate juror is disqualified because his father could read. The point is argued, and the juror finally challenged peremptorily. The defense is insanity, and as the trial progresses a mass of testimony, expert and non-expert, is received, all bearing little relevancy to the issue of the trial. A dying declaration, denominated a "dying deposition" of the decedent is offered by the prosecution and received, apparently without objection, though, "after the deposition was taken as reported, the Colonel was told for the first time by his physicians, that his wounds were mortal." The opening statement of counsel for the defense rushes from one absurdity to another, but the trial reaches the crowning climax of its extravagance when Colonel Sellers, on the witness stand, takes advantage of a heated colloquy between counsel and the court, to make a long and rambling address, in lower tone, to the jury. In the end, it develops that the defense was deceived: "The juryman with the broken nose could read." Consequently the jury were two days in arriving at a verdict of not guilty.

But no survey of Mark Twain's legalisms would be complete without some mention of "Joan of Arc." Twain regarded "Joan" as his greatest literary achievement, and many critics agree with this estimate; but, whatever value should be placed upon the book as "mere literature," it is interesting, in view of Twain's own judgment, to recall that the work abounds with detailed descriptions of the various trials of the Maid of to compel her to perform an alleged contract to marry and concluding with the trial, on numerous political and religious accusations, which resulted in her martyrdom at the stake. Here Twain was in a strange field, foreign to our time and to our system of jurisprudence. But there is the same painstaking detail, always so characteristic of Twain at his best, the same dramatic interest that he was always seeking, and the same climax in a court room scene, achieved here with the consummate skill of a master. "Joan" is so different. There is no joyous fooling or lambasting here. All is high seriousness. And whatever the work contributes to Twain's fame as a literary artist, it drives home the conviction that he was supreme in his handling of legal notions for the purposes of literature. His whole work from "Joan" to "Tom Sawyer" proclaims that he rests his fame, more than any other writer of his time, upon what he knew of law and lawyers.

ALVIN WAGGONER.

Philip, S. D.

FERGUSON v. FITZE.

Court of Civil Appeals of Texas.

173 S. W. 500.

A purchaser for value before maturity, without notice of a note and mortgage securing it, given by an insane person to the payee, for services to be rendered, may not enforce the note and mortgage, where the payee did not render any service.

McMEANS, J.: On August 24, 1910, Mrs. H. C. Ferguson executed and delivered to C. B. Fitze and Uvalde Burns her promissory note for $200, and at the same time, to secure the payment thereof, executed and delivered to the said Fitze and Burns a mortgage on a certain tract of land in Angelina County. Afterwards, and before the maturity of the note, C. G. Fitze purchased said note and mortgage from Fitze and Burns, paying a valuable consideration therefor, and without suit thereon and for foreclosure of the mortgage. After the filing of the suit, it being made to appear to the court that the defendant Mrs. Ferguson was then insane, the court appointed I. D. Fairchild, a practicing attorney, guardian *ad litem* of Mrs. Ferguson, to represent her interest in the case. The defendant, through her guardian *ad litem*, answered, pleading, among other defenses, that Mrs. Ferguson was insane at the time she executed and delivered the note and mortgage sued upon. The case was tried before a jury upon special issues, and, upon return of their answers, judgment was rendered upon motion of the plaintiff in his favor, for the amount of the note, and for foreclosure of the mortgage lien upon the land. From this judgment the defendant has appealed.

In response to special issues the jury answered that the plaintiff purchased the note in question before its maturity and paid a valuable consideration therefor. They also found that Mrs. Ferguson, on the date she executed said note and mortgage, was of unsound mind; that is "her mind was in such diseased condition that she was incapable of knowing the effect of her acts and incapable of comprehending the nature of business transactions." These findings are not challenged by the appellee.

Mrs. Ferguson was charged by indictment in the District Court of Angelina County with the commission of a felony, and upon a trial, on May 26, 1909, was convicted and sentenced to a two years' term of imprisonment in the penitentiary. Afterwards the judgment was reversed by the Court of Criminal Appeals, and the case against her remanded for a new trial. In the spring of 1911 another trial of her case was had, and she was again convicted and sentenced to the penitentiary, but the trial court granted her a new trial. After this she was in a proper proceeding declared to be a lunatic, and confined in one of the state's institutions for the insane, and the felony charge against her was thereafter dismissed. Between the first and second trials on the felony charge, she employed C. B. Fitze and Uvalde Burns, practicing lawyers, to represent her in the case, and for their services to be performed executed to them the note and mortgage herein sued upon. The evidence is undisputed that Fitze and Burns never, after their employment, performed any of the service for which they were employed cover upon the note and to foreclose the mortgage.

(1) The contract of a person *non compos mentis*, like that of an infant, is not void, but voidable at the election of the party. Williams v. Sapieha, 94 Tex. 433, 61 S. W. 115, and authorities cited.

(2) Where the contract is for necessaries, and the consideration is performed, or where the contract is for legal services rendered to the party resting under disability, it seems that the reasonable value therefor may be recovered. Searcy v. Hunter, 81 Tex. 647, 17 S. W. 372, 26 Am. St. Rep. 837. And this is especially true if the legal service is rendered to an infant or insane person who is charged with the commission of a crime. Askey v. Williams, 74 Tex. 297, 11 S. W. 1101, 5 L. R. A. 176.

(3) Where an insane person gives a note secured by mortgage to attorneys for a fixed fee to defend him against a felony charge, an action thereon may be defeated by the payment of either the agreed fee or a less amount, if such should be reasonable compensation for the attorneys' services. Askey v. Williams, *supra*.

(4) It follows from this that if no services were rendered by the attorneys in behalf of the insane client, in pursuance of the employment, the recovery upon the note and mortgage could be defeated by proof of such fact. As before stated, the evidence shows without dispute that no services were performed by Fitze and Burns for Mrs. Ferguson under their contract of employment; and it necessarily follows that, had this suit been brought by them, they could not have recovered.

(5) But does this rule apply to C. G. Fitze who was shown to have been an innocent purchaser of the note, for value, before maturity? On the authority of Williams v. Sapieha and Searcy v. Hunter, *supra*, we must answer that it does. In the Sapieha Case, Mason, a person *non compos mentis*, gave to Tolson a power of attorney to sell his land, and, acting under this authority, Tolson sold the land to Sapieha, who paid full value for it, not knowing that Mason was insane at the time he executed the power of attorney nor at the time of the execution of the deed by Tolson; and it was held that the power of attorney and the deed could be disaffirmed by Mason against Sapieha, the purchaser. In Askey v. Williams, the defendant, a minor, employed an attorney to defend the note, and in a suit for the land the validity of the sale was in issue. It was held that the deed of trust which contained the power of sale was voidable; that the sale made by the trustee under the power was subject to be avoided by the minor just as if the deed had been executed by the minor in person. If, then, a power of attorney, or a power of sale given in a deed of trust by an infant or a lunatic, may be avoided on the ground of such disability, and a deed made under such power to a third person, who buys without notice of the disability, may be disaffirmed and avoided, we see no reason, under the facts of this case, why Mrs. Ferguson cannot disaffirm and avoid the note and mortgage given by her to Fitze and Burns, and conveyed by them to C. G. Fitze; and as it was shown that the consideration for which the note was given was never performed, and that therefore Fitze and Burns, had they not sold the note, would not have been entitled to recover thereon or even upon *quantum meruit*, it is not perceived that C. G. Fitze, because he in good faith acquired the ownership of the note and mortgage, occupies a more advantageous position or acquired greater rights than his vendors possessed. In 22 Cyc. 1211, it is stated that:

"The right of a person or his guardian, personal representative, or heir to avoid a contract entered into when he was insane cannot be defeated by the fact that a third person has in good faith and for value acquired an interest under the contract."

We think that, under the facts proved, the court should have entered judgment in favor of the defendant, Mrs. Ferguson, and therefore the judgment of the court below is reversed, and judgment here rendered for the appellant.

Reversed and rendered.

Note—*Enforceability of Negotiable Note of an Incompetent Person in the Hands of an Innocent Purchaser.*—In considering whether an incompetent person may execute a paper, which shall be enforceable in the hands of an innocent holder for value, some of the courts have inquired (1) whether the maker or indorser has been formally adjudged incompetent; (2) whether the incompetency has been brought about by such signer's own weakness or vice and, (3) whether the status of an incompetent at the time of signing of itself voids such a paper as having no contractual basis whatsoever.

Taking these inquiries in inverse order, it has been held that the law is more concerned in the protection of persons bereft of reason than of

But this does not preclude recovery on an adequate consideration of benefits furnished to the incompetent maker. Hoster v. Beard, 54 Ohio St. 161, 31 L. R. A. 161; Surles v. Pipkin, 69 N. C. 513; McKee v. Purnell (Ky.) 38 S. W. 705.

The note of an insane person, but not formally adjudged so to be, and depending on a perfectly good consideration and taken by one without notice of the insanity, has been held enforceable. National Medal Edge Co. v. Vanderver, 85 Vt. 488, 82 Atl. 837, 42 L. R. A. (N. S.) 343; Campbell v. Hooper, 3 Smale & G. 153, 24 L. J. Ch. N. S. 644; Mut. L. Ins. Co. v. Hunt, 79 N. Y. 541; Myers v. Knabe, 51 Kan. 720, 33 Pac. 602; Abbott v. Creal, 56 Iowa 175, 9 N. W. 115 Copenrath v. Kienby, 83 Ind. 18.

These cases, however, go upon the theory that there is both ignorance of the incapacity and an adequate consideration. If there is absence of the latter, the instrument is void. Jordan v. Kirkpatrick, 251 Ill. 116, 95 N. W. 1079; Northwestern Mut. F. Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185. And the consideration must be present and not for an antecedent debt. Mahoney v. Goepper, 8 Ohio Dec. 154; Smith's Committee v. Forsythe, 28 Ky. L. R. 1034, 90 S. W. 1075.

If the taker has notice of the insanity, consideration will not save the instrument. Creekmore v. Baxter, 121 N. C. 31, 27 S. E. 994; Ricketts v. Joliff, 62 Miss. 440. Courts holding to absolute invalidity though not formally adjudged are Boyd v. Mulvihill, 61 Neb. 878, 86 N. W. 922; Curtis v. Brownell, 42 Mich. 165, 3 N. W. 936; Bates v. Hyman (Miss.) 28 So. 567.

The negotiable instruments law has been held not make an instrument absolutely void enforceable in the hands of an innocent holder for value. Green v. Gunsten, 154 Wis. 69, 142 N. W. 261, 46 L. R. A. (N. S.) 212.

This was held in the case of a note signed by one so intoxicated that the faculties of his mind were destroyed, and was based on the principle that insanity of the maker is a good defense against a bona fide holder, who is said to take such a note "charged with constructive notice of the legal disability of the maker," there being cited for this principle, 1 Dan. Neg. Inst. § 209, 210; Joyce, Defenses to Com. Paper, § 71. The court said: "It is no greater hardship to charge a holder in due course with constructive notice of the incapacity of the maker resulting from complete drunkenness than from insanity."

As supporting this position, see Caulkins v. Fry, 35 Conn. 170. But generally the view is that intoxication dethroning reason is unlike insanity, the one being a misfortune and the other a vice. Sentance v. Poole *supra*. The leading case on this idea is State Bank v. McCoy, 69 Pa. 204, 8 Am. Rep. 246. See also Smith v. Williamson, 8 Utah 219, 30 Pac. 753; Abbeville Trading Co. v. Butter, 3 Ga. App. 138, 59 S. E. 450; Benton v. Sikyta, 84 Neb. 808, 122 N. W. 61, 24 L. R. A. (N. S.) 1057.

The conclusion seems to be that incompetency of a permanent character absolves from liability even in the hands of an innocent holder, but in-

ITEMS OF PROFESSIONAL INTEREST.

JOHN D. LAWSON—A LEADER IN REFORM IN PROCEDURE.

The movement for reforming procedure, for eliminating technicalities from pleading and practice, which has made such great advances in recent years, has known no more consistent champion than the subject of our sketch, Hon. John D. Lawson, of Columbia, Mo., whose likeness graces our front cover page.

Mr. Lawson was born in 1852, in Hamilton, Ontario. Shortly after being admitted to the bar in St. Louis, he became editor of the Central Law Journal, in which capacity he served from 1876 to 1881, later becoming a member of the faculty of the University of Missouri Law Department.

Mr. Lawson's services to his profession have been larger than are usually expected from lawyers in active practice. Indeed it may be said that he has given largely of the best years of his active professional life to the performance of official duties to which he was called by his brethren at the bar, both in his own state and in the nation. He served as president of the Missouri Bar Association in 1904, and has almost continuously served on important committees of the American Bar Association and as a member of its general council.

Mr. Lawson is, however, distinguished for his services to the cause of reforming procedure, having raised his voice in this behalf as early as 1890, and in many public addresses since that time, as well as in active service on committees he has stirred the public as well as the professional conscience on this important subject.

Mr. Lawson's most conspicuous service in this connection was rendered as chairman of the Committee on Reform of Criminal Procedure of the American Institute of Criminal Law and Criminology. In this capacity he visited England, France and Spain, spending six months in England in 1910, six months in France in 1912, and six months in France and Spain in 1913, studying criminal procedure, the results of which investigation were published in an elaborate report, which has been printed by Congress.

Mr. Lawson carries with him an attractive personality and a good fellowship that has made him one of the best liked and one of

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS' ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 74.

The answers of the committee to question No. 47 have prompted the following inquiry.

A firm of attorneys have from time to time been selected by a collection agency as special counsel in respect to the enforcement of the collection of claims entrusted to it by its patrons; this firm is not the regular counsel for the agency, but is employed occasionally, upon claims and in litigation, when the regular counsel is not engaged. The collection agency, while not undertaking to do or doing any actual legal work, has designated its own employes to examine and prepare accounts and data, to find witnesses, interrogate them, report the facts to said firm, serve summonses and subpoenas, and correspond with its patrons in respect to the facts of the claims and the litigation. The firm has rendered its bills for legal services to the patrons of the agency, but in its care, and has had no communication with the patrons, except through the agency. In view of the fact that the agency through its own employes has lightened the labors of the counsel, they have reduced their bills accordingly, at the instance of the agency, so as to enable this agency to render a bill to its patron for the service actually performed by its own employes, without increasing the amount of the charge to the patron beyond the amount which would be charged by the firm, if it were required to render not only the strictly legal services, but also the incidental services now and heretofore performed by employes of the agency.

Should the firm discontinue its practice of charging less to the patrons of the agency than to its other clients, for whom it necessarily performs the services which in the case of the agency's patrons are performed by the agency?

ANSWER No. 74.

In order not to prejudge similar questions which may come before another committee of this association, this committee expresses no opinion as to whether or not the arrangement above described involves the unlawful practice of law by the collection agency. If it does, the lawyer should, of course, not lend himself to the arrangement.

Assuming that the collection agency is not ever may be the effect or intent in the present instance) such an arrangement is too apt to facilitate the solicitation of business for attorneys, and the division of a lawyer's fees with a layman. In the opinion of the committee, such results should be avoided by making the relation of the lawyer to the patron the direct relation of attorney and client, and by making the lawyer's reasonable charge for his services to the client in such manner as to disclose the lawyer's identity and relation and prevent the agency from concealing his charge or covering it in its own charge.

This committee is also of the opinion that such services as are involved in preparing a litigated case for trial upon the facts should be performed by, or under the direction of an attorney who may be held responsible to client and court according to the measure of a lawyer's responsibility, rather than by, or under the direction of, a lay intermediary which is presumably in the business of soliciting claims that may result in litigation.

QUESTION No. 78.

The following questions are submitted by a lawyer who, while managing clerk in the employ of another lawyer, learned of the latter's irregularities as specified below. The inquirer has severed his relations with said former employer on account of the said irregularities, but he now inquires whether it is his professional duty to take any other steps in respect to the matter, and, if so, what.

(a) While in the said employ the inquirer learned by virtue of his employment that his employer, acting in behalf of a plaintiff in a negligence action, had received from a casualty company which appeared for the unsuccessful defendant, a check in full payment of a judgment for damages and costs rendered in behalf of the plaintiff, the employer's client, but the employer (as the inquirer is advised by the plaintiff) has not acquainted the plaintiff with the fact of such payment or accounted to him for the amount thereof, but has falsely informed his client that an appeal from said judgment is pending and has retained the money without the knowledge of the client.

(b) The employer was retained to prosecute an action for breach of promise of marriage; the inquirer learned from an affidavit procured by him at his employer's suggestion, detailed facts which if disclosed would demonstrate that the plaintiff had no cause of action, and particularly when the alleged promise was nizance of the contents of the affidavit but nevertheless directed the inquirer to serve a summons upon the defendant, and the defendant was accordingly served by direction of the inquirer.

(c) While in the said employment the inquirer learned of the misapplication by the employer of funds entrusted to him by a client for investment, and the employer falsely represented to his client that the investment had been made as directed and falsely persuaded the client to delay foreclosure on the pretense that the maker of the obligation, in which he falsely pretended to have made the investment, is an honest but poor man.

ANSWER No. 78.

This committee never expresses an opinion as to whether a given state of facts is ground for disciplining an attorney. To do so would trench upon the jurisdiction of another committee of this association. This committee therefore treats question No. 78, as presenting but one inquiry, viz., whether it is the professional duty of a lawyer to inform against his former employer, also a lawyer, when knowledge of the employer's flagrant wrongdoing has come to the employe in the course of the latter's employment as managing clerk—that is, in a confidential capacity. In the opinion of the committee, an employe, being a lawyer, owes a higher duty to his profession at large than to a dishonest employer, and therefore, should not only leave the employment, but lay all the facts before the proper committee of a bar association. (See No. 29, Canons of Ethics of the American Bar Association.)

CORRESPONDENCE.

TRIBUTE TO MR. MELDRIM.

Editor Central Law Journal:

In the "Central" of the 5th inst., under "Items of Professional Interest," I read with pleasure your notice of Hon. Peter W. Meldrim, of Georgia. Your compliment of him is elegant and true, in fine taste and certainly not too strong; in fact it made one who had heard Judge Meldrim wish that you had written even more strongly. I heard him deliver an address before the Missouri Bar Association at its annual meeting in 1911. The address was would not at all be out of place on the bench of the U. S. Supreme Court.

Very respectfully,

Liberty, Mo. D. C. ALLEN.

THE DRED SCOTT CASE.

Editor Central Law Journal:

The lines as to error when wounded, writhing and dying, do not seem to be universally applicable. In the last fifty-seven years it has been repeatedly and erroneously declared that the Supreme Court of the United States, in the Dred Scott case, decided that "negroes had no rights which the white man was bound to respect." One of my first acquisitions of knowledge was that the court did not decide anything of the kind. So many attempts have been made to correct this error that it is difficult to estimate the number, and yet in a recent issue of a periodical published in Los Angeles, which is called "The California Outlook," there is an article by a person who appears to be a member of the bar and "Lately Professor of Constitutional Law in the University of South Dakota," in which he asserts that the opinion of the chief justice, concurred in by all of his associates except Curtis, of Massachusetts, and McLain, of Ohio, was that "negroes had no rights which the white man was bound to respect." It would seem that the University of South Dakota should be congratulated. Yours truly,

FRANK W. CLANCY.

Santa Fe, N. M.

NOTE.—Our correspondent calls attention to a hoary error possibly entertained by a great many because of persistency in misrepresentation. We had no idea, however, that such an individual as is spoken of by our correspondent shared in any such belief. Possibly it is well to try again to lay the error in its little bed.

Chief Justice Taney, in his opinion in Scott v. Sandford, 20 How. l. c. 407, in stating what was public opinion, at the time of the adoption of the constitution, in regard to members of the negro race, said: "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit." The chief justice was merely reciting what he regarded as history, to ascertain whether under the constitution a free negro, who was a descendant of those who were brought here and

Two only of the nine members of the court dissent (Justices McLean and Curtis), both of whom seem, in a measure though not unqualifiedly, to challenge as being a fact in history what was stated by the chief justice to be such. That it was decided as a legal principle well-informed lawyers would never assert. The fact was used as an alleged prevalent view in interpretation of a written instrument at the time it came into existence. EDITOR.

BOOK REVIEW

THE LAW OF CARRIERS OF GOODS.

This book by Mr. Ralph Merriam, of the Chicago Bar, appears to be of a series for "Home Study Under Expert Guidance," issued by La-Salle Extension University. He calls it a treatise "intended to supply the reader with a knowledge of the elementary principles of the law of carriers of goods, and to furnish him training in the analysis and application of the decisions of the courts."

This kind of knowledge should, we think, be superior to mere case law, which might give one merely instances about as fully worth remembering as geographical data in a history of the world. If one might remember all he has learned, yet his information would be divisible into so many items of local application.

The author hopes that the book "will enable the reader so to grasp the essentials of the subject as to equip him for investigating the particular questions which may arise in his business or profession." If it does, it gives him a good start in life.

But the record the writer made for himself seems, upon investigation of the book itself, scarcely more than the compilation of certain propositions announced by selected cases, with little of independent reasoning to show their intrinsic soundness.

At the close of different chapters in the book there are submitted for use of the student quizzes in "test questions," which generally are well framed and searching. Upon the whole, we think, the book is very excellent in its way in a student series. He may correlate in this way the propositions the selected cases state, but we doubt whether the way these cases are set forth calls for much more than his memory instead of his reasoning faculties.

HUMOR OF THE LAW.

Officer, there's a terrible fight going on round the corner to the right." Thank you sir. I'll do as much for you some day, sir," said the policeman gratefully, as he took the turning to the left and quickly disappeared.—Liverpool Mercury.

Election Agent—"Well, did you discover anything in Stump's past life that we can use against him?"

Detective—"Not a thing. All he ever did before he came here was to sell awnings."

Election Agent—"Why, that's just what we want. We'll say that he has been mixed up in some decidedly shady transactions."—London Tit-Bits.

Here is a story which Baron Douse, the celebrated Irish judge, once told in that exaggerated Irish "brogue" which he loved to employ: "I was down in Cork last month, holding assizes. On the first day, when the jury came in, the officer of the court said: 'Gentlemen av the jury. ye'll take your accustomed places, if ye plaze.' And may I never laugh," said the baron, "if they didn't all walk into the dock!"—Legal Laughs.

A young lawyer employed to defend a culprit charged with stealing a pig resolved to convince the court that he was born to shine. Accordingly, he proceeded to deliver the following brilliant exordium: "May it please the court and gentlemen of the jury, while Europe is bathed in blood; while classic Greece is struggling for her rights and liberties, and trampling the unhallowed altars of the bearded infidels to dust; while America shines forth the brightest orb in the political sky—I, with due diffidence, rise to defend the cause of this humble hog thief."—Crim. L. Mag.

The Judge was a kindly old fellow, and the young barrister was nervous.

"My unfortunate client"—he began, in a quaking voice and a dry throat, then stopped.

Fumbling among his papers with a trembling hand, he began again.

"My unfortunate client"—but his throat dried up.

Desperately mopping his brow with a handkerchief, he made another attempt.

"My unfortunate client"—but it was no good.

The Judge, smiling down at him in a kindly

WEEKLY DIGEST.

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Account Stated**—Evidence.—Uncontroverted proof that the correctness of an account rendered has been admitted by failure to dispute it within a reasonable time authorizes recovery, without resorting to the original entries or other proof.—Fayette Liquor Co. v. Jones, W. Va., 83 S. E. 726.

2. **Adverse Possession** — Notoriousness.—To give title by adverse possession to a part of a public way, the occupancy must warn the public that the abutting owner is actually claiming the property as his own.—Crosby v. City of Greenville, Mich., 150 N. W. 246.

3.——Right of Way.—Possession by a railroad under an agreement for a right of way of less width than was described in a deed and claimed by the railroad was not a possession of the greater tract under the deed.—Central Indiana Ry. Co. v. McMains, Ind., 107 N. E. 88.

4. **Banks and Banking**—Directions.—Where a bank receives a telegram stopping payment of a draft, it must obey without inquiring whether any mistake had been made in transmitting.—West v. Cowan, Ala., 66 So. 816.

5.——Double Liability.—Where a trust company, organized under Laws 1901, c. 11, art. 5, as amended by Laws 1905, c. 10, art. 3, does a "banking business," within the act approved March 10, 1899 (Laws 1899, c. 4, § 37), and fails, a stockholder's liability is measured by section 16 of the act of 1901 and limited to double the amount unpaid on his stock.—Lankford v. Menefee, Okla., 145 Pac. 375.

6. **Bills and Notes**—Accommodation Maker.—That the maker of a note signed without consideration, to lend his name to another, makes him, under the Negotiable Instruments Act, an "accommodation maker," liable to a holder for value, though, when taking it, knowing him to be such.—Metzger v. Sigall, Wash., 145 Pac. 72.

7.——Notice of Dishonor.—That accommodation indorsers of a note are directors of the corporation, which is the maker, and constitute a majority of the board of directors, does not deprive them of right to notice of dishonor.—Houser v. Fayssoux, N. C., 83 S. E. 692.

of corroboration.—Corpenning v. Westall, N. C., 83 S. E. 783.

9. **Breach of the Peace**—Abusive Language.—A person under arrest who, without provocation, uses abusive language to or of the officer having him in charge, is punishable under Pen. Code 1910, § 387, where the character of the language would naturally tend to cause a breach of the peace if addressed to a private person.—Elmore v. State, Ga., 83 S. E. 799.

10. **Cancellation of Instruments**—Voidable Contracts.—A creditor of a corporation, as well as the corporation or a stockholder, may avoid voidable contracts of the corporation, if he can show that the transaction complained of lessened the corporation's ability to pay his debt.—Bossert v. Geis, Ind., 107 N. E. 95.

11. **Carriers of Goods**—Bills of Lading.—A carrier is liable to a person who has purchased corn described in a bill of lading and paid the attached draft, though it did not receive the shipment at all, or did not receive it before issuing the bill of lading.—Harold v. Atchison, T. & S. F. Ry. Co., Kan., 144 Pac. 823.

12.——Limiting Liability.—A stipulation limiting liability to the agreed value of an interstate shipment is valid though the loss is due to the carrier's negligence, where it in good faith has accepted the value fixed as the real value and the freight rate has been fixed thereon.—St. Louis & S. F. R. Co. v. Mounts, Okla., 144 Pac. 1036.

13.——Notice of Loss.—Stipulation in bill of lading that the carrier shall not be liable unless written claim for loss, damage, or delay be made within four months after delivery, or, in case of non-delivery, within four months after reasonable time for delivery, is reasonable and binding.—Forney v. Seabord Air Line Ry., N. C., 83 S. E. 686.

14. **Carriers of Passengers**—Contributory Negligence.—Where no part of defendant's locomotive overhung a passenger platform, a passenger walking on such platform, who was struck by a locomotive, cannot recover; it appearing that his own body extended out beyond the limits of the platform.—Hutchinson v. Boston & M. R. R., Mass., 107 N. E. 271.

15. **Commerce**—Attorney Fees.—Gen. St. 1909, § 7107, allowing attorney's fees in actions for shortages on shipments held not obnoxious to the federal regulations of interstate commerce.—Harold v. Atchison, T. & S. F. Ry. Co., Kan., 144 Pac. 823.

16. **Contracts**—False Representations.—Representations so outrageous that the court may assume them to be false without proof will not vitiate a contract on the ground of fraud.—Peterson v. Hoftiezer, S. D., 150 N. W. 934.

17.——Forfeiture.—Waiver by a party to a contract of the right to forfeit it cannot be inferred in the absence of language or conduct inconsistent with an intention to insist on a forfeiture.—Sovereign Camp, Woodmen of the World v. Jones, Ala., 66 So. 834.

18. **Corporations**—Advancements by Officers.—A corporation may borrow money from its officers or directors to carry on its business or pay its debts, and if such loan is in good faith and without any abuse of power on the lender's part to obtain an unfair advantage over other creditors, he may enforce his claim as any other creditor of the corporation.—Bossert v. Geis, Ind., 107 N. E. 95.

19.——Valuation of Assets.—Where stockholders act in good faith without fraud in valuing a corporation's assets to pay stock subscriptions or dividends, no creditor can successfully complain.—Northern Bank & Trust Co. v. Day, Wash., 145 Pac. 182.

20. **Criminal Law**—Appeal and Error.—Though accused has served part of a void sentence, the appellate court may, when it affirms a conviction, void as to the sentence, correct the judgment and direct the trial court to im-

and one for receiving stolen goods, the court could properly adjudge the defendant guilty of burglary.—Hughes v. State, Ala., 66 So. 844.

22. **Damages**—Evidence. — Plaintiff raising beets for defendant, to be delivered at station, having, on defendant failing to get cars, agreed to pile and cover them, and they, being piled, having spoiled, can recover if he covered, or if not covering, this did not cause the spoiling.—Romey v. Rock County Sugar Co., Wis., 150 N. W. 981.

23. **Death**—Measure of Damages.—In an action for wrongful death, the measure of damages is that sum which will purchase an annuity equal to the portion of deceased's earnings which would reach the beneficiary, during the period of the expectancy of life of deceased.—Secord v. John Schroeder Lumber Co., Wis., 150 N. W. 971.

24. **Deeds**—Cancellation. — Where cancellation of a deed is sought because not joined in by the husband, execution and acknowledgment thereof by the wife being admitted, its validity is for the court.—Wesley v. Diamond, Okla., 144 Pac. 1041.

25.——Reservation.—Deed reserving and excepting a strip of land, previously conveyed as a railroad right of way reserving a fee, held a reservation of the fee and an exception of the easement of way.—Studebaker v. Beck, Wash., 145 Pac. 225.

26. **Detinue**—Crop Renter.—Where A. furnishes land and stock with which to cultivate it, and B. furnishes labor for a crop for equal division, A. may not maintain detinue.—Tate v. Cody-Henderson Co., Ala., 66 So. 837.

27. **Divorce**—Jurisdiction.—Where it does not affirmatively appear that complainant in a suit for divorce was a nonresident of the county wherein she obtained a decree, it will be presumed, as against collateral attack, that the court, having general jurisdiction of the subject, had jurisdiction of the particular cause.—Jeffries v. Alexander, Ill., 107 N. E. 146.

28. **Dower**—Inchoate Right.—Where a sale under a trust deed executed by a husband alone was made to pay debts, including a debt secured by a mortgage signed by the wife, the amount of the mortgage debt must be deducted from the proceeds in fixing the value of her inchoate right of dower.—Mulligan v. Mulligan, Ky., 171 S. W. 420.

29. **Election**—Parties in Contests.—A candidate for public office who, according to the official canvass, received the smallest number of votes among three candidates, and who does not make any claim to the office, is not a necessary party to an election contest between the other two candidates.—Mayfield v. Miles, Ill., 107 N. E. 152.

30. **Electricity**—Due Care.—An electric light company owes to the public the duty to protect them from charged wires by exercising a high skill, the most consummate care, and the utmost diligence.—Turner v. Asheville Power & Light Co., N. C., 83 S. E. 744.

31. **Embezzlement**—Officer.—Where a city treasurer duly paid vouchers drawn on him for work done for the city, the vouchers should be treated as a good payment by the treasurer in a prosecution for wrongfully withholding city funds from his successor, though through collusion with other city officials the contractors were enabled to defraud the city.—People v. Gerold, Ill., 107 N. E. 165.

32. **Eminent Domain**—Joint Use.—Where the condemnation by a city of a joint use of a railroad right of way necessitated a 5 per cent change of grade, the company is entitled to such sum as would enable it to adjust itself to the change.—Seattle, R. & S. Ry. Co. v. City of Seattle, Wash., 145 Pac. 54.

34. **Estoppel**—Acceptance of Benefits.—Plaintiffs, who by the conduct of their agent had received a material benefit to the injury of an intervening bank, held estopped to take advantage thereof, unless they were in position to restore the bank to as favorable a position as it occupied before the transaction.—McCaull v. Nichols, N. D., 150 N. W. 932.

35. **Fish**—Criminal Evidence.—An accusation under Pen. Code 1910 § 606, charging that defendant did unlawfully catch fish with a net during the prohibited time, and not charging the offense of laying such nets, was not supported by evidence that he left nets in the river or was shad fishing, where it did not appear that he actually caught any fish.—Knight v. State, Ga., 83 S. E. 797.

36. **Food**—Animals.—Under Gen. St. 1909, § 3092, forbidding killing or sale of any diseased animal for food, selling carcasses or the flesh of animals that have been slaughtered is not within the statute; the word "animals," as commonly used, meaning a living brute or beast.—State v. Wiglesworth, Kan., 144 Pac. 831.

37. **Frauds, Statute of**—Antenuptial Agreement.—An antenuptial contract executed by a prospective wife alone fully performed, except the payment of the money consideration, held not impeachable under the statute of frauds.—Bibelhausen v. Bibelhausen, Wis., 150 N. W. 516.

38.——Part Performance.—If negotiations for the sale of land were affected by statute of frauds, deposit of specified cash payment, authorized or final acceptance of the offer, which was never done, held not sufficient part performance.—Hinz v. Middlekauff, Iowa, 150 N. W. 607.

39.——Performance.—Where a city was permitted to take possession and make improvements under a contract executed by one person under authority of the others interested, and was ready and willing to perform, it was entitled to a conveyance.—In re Midway Realty Co., Minn., 150 N. W. 615.

40. **Fraudulent Conveyances**—Bulk Sales Law.—Undisputed evidence that plaintiff purchased a stock in good faith and for value, held to rebut the presumption arising under the Bulk Sales Law that the sale was fraudulent.—Greene v. Robbins, N. D., 150 N. W. 561.

41. **Gifts**—Delivery.—Mere passage of possession of securities to one other than the payee or grantee, and to whom the security has not been assigned or indorsed, does not show a sufficient delivery to constitute a valid gift.—In re Slocum's Estate, Wash., 145 Pac. 204.

42. **Highways**—Work and Services.—Orders drawn on the road fund in payment of services under contract with a town are void, where the only work was on illegal highways and on property never in fact a highway; the town receiving no benefit therefrom.—Menasha Woodenware Co. v. Town of Winter, Wis., 150 N. W. 526.

43. **Homicide**—Malice.—Where the killing with a deadly weapon was admitted, malice is presumed, and accused has the burden of showing circumstances reducing the homicide from murder in the second degree to manslaughter or excusable homicide.—State v. Heavener, N. C., 83 S. E. 732.

44.——Reputation of Deceased.—Evidence of the general character of the deceased for violence is admissible, where there is evidence of self-defense, and defendant may also show deceased's acts of violence coming under his personal notice, or of which he had been informed by deceased.—State v. Williams, N. C., 83 S. E. 714.

45. **Homestead**—Lien.—Under Code, §§ 2972,

vides that the marriage shall not affect property rights of their own individual property, does not deprive the wife of a right to the husband's homestead.—Plistil v. Kaspar, Iowa, 152 N. W. 584.

47.——Parties.—Where a trustee, under a trust deed executed by a husband alone, filed suit against the husband and wife for the construction of the deed and for a settlement of the trust, a claim for legal services for the wife was not "necessaries," within Ky. St. § 2130.—Mulligan v. Mulligan, Ky., 171 S. W. 420.

48.——Trustee.—Where a wife contributes her separate estate for a portion of the consideration of a purchase of property by the husband, the deed to which is made to them jointly, the property does not come into possession of the husband so as to make him prima facie a trustee.—Scrogin v. Dickison, Ind., 107 N. E. 86.

49. **Indians**—Allotments.—Where a Choctaw Indian died before receiving his allotment, he had no estate of inheritance in land subsequently allotted in his name under Supplemental Agreement Act Cong. approved July 1, 1902, § 22.—Cook v. Childs, Okla., 145 Pac. 406.

50. **Infants**—Equity.—A sale by a court of equity nominally of the mineral rights in an infant's lands should not be made with such indefinite rights to the purchaser, as to use of the surface and timber for mining purposes, so as to make it impossible to sell the surface, except at a great sacrifice.—Hays v. Wicker, Ky., 171 S. W. 447.

51. **Injunction**—Inspection Fees.—Injunction will lie to prevent the holding up of oil in transit from other states for nonpayment of excessive inspection fees where there is no adequate remedy at law.—Bartels Northern Oil Co. v. Jackman, N. D., 150 N. W. 576.

52. **Insurance**—Estoppel.—Insurer, under liability policy excepting injuries caused by persons employed in violation of law, held not estopped, by taking charge and continuing in charge of litigation, to deny liability for injuries caused by negligence of boy under 16, having no employment permit.—J. S. Stearns Lumber Co. v. Travelers' Ins. Co., Wis., 150 N. W. 991.

53.——Evidence.—Where parts of insured's books of account, including those showing its inventories and cash sales were destroyed, the action of the court in adopting the bank deposits made in the name of insured, together with the unpaid accounts and bills receivable, as a basis for ascertaining the amount of the loss, held not erroneous.—Connecticut Fire Ins. Co. v. Union Mercantile Co., Ky., 171 S. W. 407.

54.——Loss.—Injury to a steam boiler from excessive heat, through negligence of some one connected with the insured's business, creates no liability under a policy insuring against direct loss from fire.—McGraw v. Home Ins. Co. of New York, Kan., 144 Pac. 821.

55.——Mortgagee.—A mortgagee has no interest in a policy on the mortgaged property to the mortgagor unless created by covenant.—Johnson v. Northern Minnesota Land & Investment Co., Iowa, 150 N. W. 596.

56.——Privity.—An employer's liability insurance policy creates no privity between the insurer and an employe and is not a promise for the benefit of the employe.—Scheuerman v. Mathison, Ore., 144 Pac. 1177.

57.——Severable Policy.—Where, in an action on a severable policy covering several classes of property, it appears that insured has committed no fraud, and no act prohibited by public policy is involved, recovery may be had on account of property not affected by the breach of

59.—**Intoxicating Liquors**—Clubs.—The act of a social fraternal order in purchasing liquor and disposing of the same to members by selling coupons good for definite quantities of liquor is a sale of liquor in violation of Burns' Ann. St. 1914, § 8351, and an employe of the order, delivering to coupon-holding members liquor according to a fixed schedule, may be convicted.—Givens v. State, Ind., 107 N. E. 78.

60.——Local Option Law.—Carrier's transportation of liquor to a wholesaler doing business in a dry unit to replenish his stock, which he sold in wet units, held not violative of the Local Option Law, § 18.—State v. Northern Pac. Ry. Co., Wash., 145 Pac. 187.

61. **Judicial Sales** — Confirmation. — Where land was excepted from a petition for sale and was not embraced in the proceedings for the sale, a decree of sale and a confirmation of the deed including the land were void, in so far as the conveyance of the land was attempted.—Horton v. Jones, N. C., 83 S. E. 751.

62. **Judgment**—Default.—That the defendants were old and feeble, although of sound mind, and that they forgot about the service of summons upon them, and therefore took no steps to defend the action, does not show excusable neglect justifying the setting aside of a default judgment against them.—Pierce v. Eller, N. C., 83 S. E. 758.

63.——Nunc Pro Tunc.—A court can enter a judgment nunc pro tunc, where one has been ordered, but the clerk has omitted to make the proper entry, and the power to make such entry is not lost by mere lapse of time.—Locher v. Livingston, Iowa, 150 N. W. 614.

64. **Jury**—Disqualification.—That a juror was served with summons as a member of the board of trustees of a village in an action to disconnect territory from the village, held not to render him a "party" to the suit within Rev. St. 1913, § 8158.—Krum v. Sullivan & Schaberg Transfer & Fuel Co., Neb., 150 N. W. 640.

65. **Landlord and Tenant**—Estoppel.—Defendant's knowledge that plaintiff had bought his tenant's crop of wheat, without his consent, as required by the lease, held to require him to assert his rights, so that his silence would operate as estoppel.—Maxwell v. Dimond, Wash., 145 Pac. 77.

66.——Re-entry.—A lease of premises to be used for hotel, saloon and bathing purposes, with right of re-entry for breach of conditions, does not authorize re-entry for failure to continue the use of the premises for saloon purposes.—Henry Rahr's Sons Co. v. Buckley, Wis., 150 N. W. 994.

67.——Surrender.—That there is a little plunder in some of the rooms of a rented house which could be removed in a few minutes is not a failure to give possession where the lessee arrived without notice and gave no time to remove before repudiating the lease.—Adams v. Hambrick, Ky., 171 S. W. 398.

68. **Libel and Slander**—Nonfeasance.—Under Rem. & Bal. Code, § 2424, defining a libel, and section 2268, declaring nonfeasance in office a crime, held that a publication charging a county prosecutor with nonfeasance in office in respect to the prosecution of a confessed criminal was libelous per se.—State v. Sefrit, Wash., 144 Pac. 725.

69. **Limitation of Actions**—New Starting Point.—A payment by the maker on a note before the bar of the statute does not operate as a renewal of the note as to mere accommodation indorsers, though it does as to sureties, as well as the maker.—Houser v. Fayssoux, N. C., 83 S. E. 692.

paid by the state treasurer and issue his receipt therefor and credit the treasurer with the sums paid.—State v. Jorgenson, N. D., 150 N. W. 565.

72. **Master and Servant**—Assumption of Risk.—A brakeman held not to assume, as a matter of law the risk of injury occurring while attempting to board an engine by stepping on a step on the pilot of an engine.—Norfolk & W. Ry. Co. v. Thompson, Ky., 171 S. W. 451.

73.——Course of Employment.—The act of a section foreman in asking men on a work train, in charge of a superior foreman in charge of the work, to jump from the train to escape injury from a collision, which the section foreman erroneously believed would occur, held to be in the course of his employment, within the federal Employers' Liability Act.—Cincinnati, N. O. & T. P. Ry. Co. v. Wilson's Adm'r, Ky., 171 S. W. 430.

74.——Fellow Servant.—Where an employe is injured by the negligence of his employer, the contributory negligence of a fellow servant will not prevent recovery.—Wenquist v. Omaha & C. B. St. Ry. Co., Neb., 150 N. W. 637.

75.——Independent Contractor.—The defense of independent contractor is not available, where the thing contracted to be done is necessarily attended with danger, or will probably become a nuisance, as digging a deep excavation for a railroad across a principal street, into which, while unguarded and unlighted, at night, a pedestrian fell.—Dunlap v. Raleigh, C. & S. R. Co., N. C., 83 S. E. 703.

76.——Independent Contractor.—A proprietor may become liable for the acts of an independent contractor by retaining or assuming control of the time and manner of doing the work, but not merely by supervising the right to dismiss incompetent workmen.—Embler v. Gloucester Lumber Co., N. C., 83 S. E. 740.

77.——Medical Attention.—The rule that an employer is bound to furnish medical attention to an injured employe on an extreme emergency does not apply, where an injured employe has been removed to a hospital of the employer's selection and selected a different surgeon than the one furnished.—Vanderboget v. Campbell Mill Co., Wash., 144 Pac. 905.

78.——Obvious Danger.—A protruding set screw upon a shaft, although somewhat covered by dirt and grease, must be considered an obvious danger, where visible, and the employer is not bound to warn an experienced employe of its presence, though such screws were not in common use in the locality.—Pettingill v. William Porter & Son, Mass., 107 N. E. 269.

79.——Proximate Cause.—Where a switchman stepped between moving cars to uncouple them, because of a defective coupler, held that his act was not the sole proximate cause of his injury, but that the violation of the Federal Safety Appliance Act contributed thereto.—Otos v. Great Northern Ry. Co., Minn., 150 N. W. 922.

80.——Respondeat Superior.—A pedestrian injured through the actionable negligence of the driver of a horse may recover from the driver's master if the driver was engaged in carrying on the master's business.—James v. Hayden Bros., Neb., 150 N. W. 1013.

81.——Simple Tools.—A repairer putting in new ties, directed to use the old spikes when possible, otherwise new spikes furnished, assumes the risk, under the simple tool rule, when driving an old spike, from rust thereon.—Paich v. Northern Pac. Ry. Co., Wash., 144 Pac. 919.

82.——Vice Principal.—A conductor ordering an inexperienced employe to walk on the top of a car, when the wind was so violent that the conductor himself had to hold to the running board to prevent being blown off, was guilty of grossly negligent conduct rendering the company liable for injuries to the employe.—Ridge v. Norfolk Southern R. Co., N. C., 83 S. E. 762.

83.——Workmen's Compensation Act.—Where the employer was under the Workmen's Compen-

84. **Mechanics' Liens**—Bankruptcy.—On foreclosure of a mechanic's lien on property of a discharged bankrupt, held that the judgment should be that the property be sold for payment of the lien debt with costs, but no deficiency judgment be entered.—Moreau Lumber Co. v. Johnson, N. D., 150 N. W. 563.

85. **Monopolies**—Indictment.—A combination by dealers in a necessary of life to raise, by agreement, the price thereof is indictable at common law.—State v. Craft, N. C., 83 S. E. 772.

86. **Mortgages**—Alteration.—Where a mortgage duly executed was changed but there was no new acknowledgment, the defect of recording and of constructive notice extended only to eliminate in legal effect the inserted clause from the record.—Johnson v. Northern Minnesota Land & Investment Co., Iowa, 150 N. W. 596.

87.——Estoppel.—Where the mortgagor knew of defects in the foreclosure, and remained silent while a purchaser made improvements, satisfied a prior mortgage, and sold the property, which greatly increased in value, held that he was estopped to assert title or right to redeem.—Purcell v. Thornton, Minn., 150 N. W. 899.

88.——Foreclosure.—Where a sale under a trust deed executed by a husband alone was made to pay debts, including a debt secured by a mortgage, in which the wife joined, of a part of the property worth more than the debt, but unmortgaged property was sold to pay the mortgage, the proceeds must be applied as if mortgaged property had been sold to discharge the mortgage.—Mulligan v. Mulligan, Ky., 171 S. W. 420.

89.——Foreclosure.—In foreclosure for nonpayment of taxes which were paid by the mortgagee, it was no defense that the description on the assessment role was defective.—Farmers' Security Bank of Park River v. Martin, N. D., 150 N. W. 572.

90.——Pretended Transfer.—Where defendant, to avoid appearance of liability, procured land to be conveyed to K., who mortgaged it for a part of the price, as a mere straw man, defendant's liability to pay the debt, though resting in parol, was enforceable by an assignee of the mortgages.—Dexter Horton Nat. Bank v. Seattle Homeseekers Co., Wash., 144 Pac. 691.

91. **Municipal Corporations**—Abolition of Office.—Abolition of a city office within the civil service solely to get rid of the incumbent and avoid performance of a decree enjoining the incumbent's removal held ineffective.—State v. City of Seattle, Wash., 145 Pac. 61.

92.——Collateral Attack.—In an action against a city for injuries from the collapse of a bridge claimed by the defendant to have been left outside of the city limits by an ordinance changing such limits, held that plaintiff could not collaterally attack the corporate organization of the city by questioning the validity of the ordinance through a contention that the statute under which the ordinance was passed (Laws 1905, c. 519, § 7) was unconstitutional.—Horner v. City of Atchison, Kan., 144 Pac. 1010.

93.——Contributory Negligence.—Momentary diversion of a pedestrian's attention is not, as a matter of law, contributory negligence.—Kelly v. City of Spokane, Wash., 145 Pac. 57.

94.——Special Assessment.—Property owned by a cemetery association is subject to special assessment for the construction of sewers by the city in which the property is located, unless expressly exempted by charter from such tax.—People v. Bloomington Cemetery Ass'n., Ill., 107 N. E. 143.

95. **Names**—Business Names.—The sole owner and manager of a business may in good faith conduct his business under any name, and sue under such name for breach of contract.—Robinovitz v. Hamill, Okla., 144 Pac. 1024.

detention lessened the supply available to run plaintiff's mill.—Johnson v. Wild Rice Boom Co., Minn., 150 N. W. 218.

97. **New Trial—Special Questions.**—New trial held not to be granted because, jury being unable to decipher the word "punitive" in a special question, the foreman entered the courtroom and asked the judge the meaning of the word, to which he replied, "Punitive, by way of punishment."—Dishmaker v. Heck, Wis., 150 N. W. 951.

98. **Partnership**—Burden of Proof.—A party, claiming that the individual note of a partner for the firm debt discharges the debt as to the firm, has the burden of proving that the note was so intended and accepted.—Fayette Liquor Co. v. Jones, W. Va., 83 S. E. 726.

99.——Dissolution.—On the dissolution of a firm, it immediately ceases to exist, except for the purpose of winding up the firm, and there can be no successor, and no question of survivorship is involved, either under the terms of the contract with the firm or by reason of the manner in which the dissolution was effected.—Schlau v. Enzenbacher, Ill., 107 N. E. 107.

100. **Physicians and Surgeons**—Employment.—Where defendant contracted with a hospital association to care for injured employes, but the physician was not satisfactory to an employe's uncle, and plaintiff was employed instead, defendant was not liable for his services.—Vanderboget v. Campbell Mill Co., Wash., 144 Pac. 905.

101. **Principal and Agent**—Opinion Evidence.—Testimony of an agent of a mortgagor that he had no authority to deliver the mortgage as changed by him is mere conclusion, where at the time he believed in good faith that he acted within his authority.—Johnson v. Northern Minnesota Land & Investment Co., Iowa, 150 N. W. 596.

102. **Railroads**—Cause of Death.—Where, in an action for death of a person struck by a train at night, the evidence showed failure of the train to carry a headlight, but the evidence of the cause of death was circumstantial, and was as consistent with decedent coming on the track suddenly in front of the train as with any other theory, there could be no recovery as a matter of law.—McNeill v. Atlantic Coast Line R. Co., N. C., 83 S. E. 704.

103.——Evidence.—Railroads being required to keep a headlight on an engine at night, testimony that a person was likely to be blinded by meeting a train, with a large headlight, at night, is improper as putting the company in a position of being guilty of negligence for doing what it was required to do.—Louisville & N. R. Co. v. Shoemake's Adm'r, Ky., 171 S. W. 383.

104. **Rape**—Pleading.—Where, in a civil action for rape, the petition charged that defendant administered to plaintiff medicine which caused unconsciousness, and assaulted her while unconscious, such allegation as to unconsciousness was surplusage and did not authorize an instruction that plaintiff could not recover unless she proved that the assault was committed while she was so unconscious.—Wessel v. Lavender, Mo., 171 S. W. 331.

105.——Resistance.—Consent by the female, however reluctantly given, prevents the offense being rape, but a woman who does not consent need not continue to physically resist in face of reasonably supposed imminent peril of great bodily harm.—Skulhus v. State, Wis., 150 N. W. 503.

106. **Reformation of Instruments**—Fraud and Mistake.—A petition by a grantee, which alleges that she was informed and believed that the deed was subject to a life estate in the grantor, held not to state a cause of action for fraud and mistake in reserving a life estate also for his wife.—Plistil v. Kaspar, Iowa, 150 N. W. 584.

107. ...

claim deed from the life tenant, the tax title is not necessarily merged in the conveyance of the life estate.—Jinkiaway v. Ford, Kan., 145 Pac. 885.

109. **Replevin**—Right of.—The owner may replevin chattels levied on by an officer not in possession, if the officer could take possession as against a wrongful taker.—Francis v. Guaranty State Bank of Texola, Okla., 145 Pac. 324.

110. **Schools and School Districts**—Taxation.—Where extensive repairs and improvements were needed for various school properties, the mere fact that the school board, in making its estimate, levied a tax for an amount larger than was actually required, did not render such act fraudulent, in the absence of proof that the tax was grossly excessive.—People v. Bates, Ill., 107 N. E. 123.

111. **Set-off and Counterclaim**—Action for Death.—A counterclaim for damages to the rolling stock of a railway company by the negligent act of the driver of an automobile cannot be asserted against the beneficiaries in an action under Lord Campbell's Act.—Craig v. Chicago, St. P., M. & O. Ry. Co., Neb., 150 N. W. 648.

112. **Street Railroads**—Proximate Cause.—Failure to warn a person negligently walking beside a street car track when there was opportunity, if warned, for him to step aside is the proximate cause of the injury.—Mobile Light & R. Co. v. Drooks, Ala., 66 So. 824.

113. **Taxation**—Income Tax.—Under the statute providing for set-off against income tax of a tax on personalty paid, it is the identity of time for which each is paid, and not the time when the income tax becomes due, that is the basis of the right to set-off.—Van Dyke v. City of Milwaukee, Wis., 150 N. W. 509.

114.——Levy.—Where the Legislature grants power to levy a tax for a particular purpose and prescribes the conditions under which and the method by which the tax is to be levied, the provisions of the statute must be substantially complied with or the tax will be void.—People v. Jacksonville & St. L. Ry. Co., Ill., 107 N. E. 237.

115. **Telegraphs and Telephones**—Pleading.—In an action for damages from the payment of a draft in consequence of a mistake in a telegram stopping payment, the complaint need not negative the bank's knowledge of the mistake.—Western Union Telegraph Co. v. Louissell, Ala., 66 So. 839.

116. **Trespass**—Pleading.—If the declaration in trespass be general, without describing the locus, and defendant, filing a plea of liberum tenementum, has any land in the jurisdiction, plaintiff must make a new assignment setting out a description with more certainty.—Ward v. Mississippi River Power Co., Ill., 107 N. E. 115.

117. **Trusts**—Estoppel.—If it was the intention, when a conveyance was made to a wife, to confer a beneficial interest upon her, the husband, paying the purchase money, cannot put a different construction on the transaction at a subsequent time.—Dodge v. Thomas, Ill., 107 N. E. 261.

118. **Wills**—Heirs.—The word "heirs" in its primary legal sense means those entitled to succeed to a decedent's property in case of intestacy, but in a secondary, and more general, sense, may mean those on whom property of any kind devolves on the death of another, either by law or will.—Hoke v. Jackman, Ind., 107 N. E. 65.

119.——Incapacity of Testator. — Infirmity from old age does not render a person incapable of making a will unless it has so far impaired the testator's mind that he is incapable of un-

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THE NEED OF CERTAINTY IN A CRIMINAL STATUTE TO MAKE IT CONSTITUTIONAL.

It seems to us that we are constantly getting further away from the principle, that a criminal statute should be so definite as to enable those included in its terms to know in advance whether an act is criminal or not, and an illustration of how very far we have gone in this departure is shown by a recent unanimous decision by the federal Supreme Court, affirming a ruling by Washington Supreme Court. Fox v. Washington State, 35 Sup. Ct. 383.

The statute held constitutional by the above courts provided that: "Every person who shall wilfully print, publish, edit, issue or knowingly circulate, sell, distribute or display any book, paper, document or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or any court or courts of justice, shall be guilty of a gross misdemeanor." Under such a statute we undertake to say, that there is not given any criterion between an honest and a dishonest publication, between one made in good faith and one for the accomplishment of some unlawful purpose.

We would not have to exercise our fancy inordinately to suppose that in a certain state of public opinion the open advocacy by printing or writing and circulation of certain doctrines regarded by the circulator as tending to advance morality or science ample, it is related that a Paynim Knight and a Crusader, after fraternizing in a soldierly way, fell out and nearly came to blows, because the latter told the former, that in his country the rivers often became so hard on the surface, that one could walk across them. This Crusader might have been punished according to law under this statute, if a jury should think, whether he did or not, that the printing and circulation of such extraordinary information tended to a riot.

The case in which plaintiff in error objected to this statute's uncertainty was surely a gross one, but he was charged on information, under perhaps the most general clause of the statute, with editing and circulating certain printed matter tending to encourage disrespect for law. This matter was an article entitled, "The Nude and the Prudes," and it advocated the boycott of certain people who procured the arrest and punishment of certain members of a society called the "Homeites" for indecent exposure. While we hold in as great abhorrence as anyone any such sentiments as were advocated in this article, we regard with equal abhorrence the suffering of such advocacy to make a hard case in the law stand for a hurtful precedent.

And it seems to us that the opinion by Mr. Justice Holmes quite nearly admits that in general aspect the statute is too uncertain to be constitutional, but he sustains its constitutionality, not as a statute, but according to the way courts may see fit to enforce it.

Thus we quote from the opinion, as follows: "We understand the state court by implication, at least, to have read the statute as confined to encouraging an actual breach of the law. Therefore the argument that this act is both an unjustifiable restriction particular statute or of law in general. In the present case the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act."

The fact, that appeal is made in the last clause above to the facts of the case at bar to sustain the general conclusion of constitutionality, exhibits to our mind a lack of confidence in the reasoning advanced. A law is constitutional or not for one offender as well as for another. And neither is supposed to take his chances of liberty according to the "likely" way a statute may be construed by the courts. The question is far deeper than that. And if the "likely" way depends upon the circumstances of a particular offense, uncertainty is the rule in application.

There appears to us here also something of surrender by our highest court, bound to construe our federal constitution for state courts, when it ought to lay down for the latter some guiding rule in cases of this kind. If a state law may, as construed in a certain way by state courts, offend the federal constitution, may our highest court permit it to go abroad as constitutional, when the reasons given for sustaining it in a particular case themselves logically offend constitutionality?

Another reason stated by Mr. Justice Holmes for sustaining the conviction in this case is that: "By indirection, but unmistakably, the article encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure; and the jury have so found." But shall not an accused be informed before he commits an act of a reasonable certainty that his act directly, and not by some theory of indirection, however to an abuse, but in doing the latter it ought to inform citizens what in all cases with reasonable certainty amounts to stepping across the boundary. Something is said about statutes being held valid where they sustain the use of the word "tend," but we think these cases ought not to control in a case of this kind. The thing to which a tendency is denounced is more certain as an offense when directly committed, than what is here spoken of, so far, at least, as the only clause of the law considered by the court is concerned. We hardly think, however, that the clauses are separable in character, so that if one clause goes by the board the others would remain unaffected.

NOTES OF IMPORTANT DECISIONS

NEGLIGENCE—APPLICATION OF DOCTRINE RES IPSA LOQUITUR IN FAVOR OF LICENSEE.—The Supreme Court of Missouri lately considered the question of liability (under a "Fire Escape Ordinance") of the owner to a roomer in a lodging house. Burt v. Nichols, 173 S. W. 681.

Its position on this subject is known by the following excerpt: "The rule *res ipsa loquitur* has been invoked in cases which upon analogy are similar in all material aspects to the conditions found here. For example, it was held to apply to an injury received by a clerk of a shipper upon a railroad who went to the railroad yards to inspect a shipment of goods consigned to his employer. Taterman v. Railroad, 96 Mo. App. 448, 70 S. W. 514. There, as here, no contractual relation or privity by contract subsisted between the plaintiff and the defendant. Plaintiff there, as here, was merely upon the premises as an implied licensee. Blanton v. Dodd, 109 Mo. 74, 18 S. W. 1149; Gallagher v. Edison Co., 72 Mo. App. 576;

safety appliance laws are violated and death, unexplained except by the physical facts, occurs by fire in the burning of a building not equipped with the required appliances but which is by law required so to be, the rule of *res ipsa loquitur* should be invoked to take the case to the jury, where all inferences pro and con and all matters of contributory negligence can be resolved under proper instructions by the triers of fact."

The rule *res ipsa loquitur* ought to be deemed a rule applicable in every instance where it is established that there is a duty owed by defendant to plaintiff and the latter has gone as far with his proof as one in his situation reasonably could be expected to go. Then, if in what has happened there is not displaced inference of fault in the management of a business defendant owns or conducts, the burden should shift to him. This we understand to be the rule in patent cases according to its latest development and marking a distinct departure from old decisions, as shown in the case of Westinghouse Electric Mfg. Co. v. Wagner Electric Mfg. Co., 32 Sup. Ct. 691.

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY NOT SHOWN BY RULING WORKING INVOLUNTARY NONSUIT.—The right of removal of a suit brought against non-resident and resident defendants is shown to depend almost altogether upon the question of good faith in joining the resident defendants, and, therefore, though a trial court may sustain a demurrer to the evidence as against the latter, this is not at all conclusive against plaintiff's right to recover against a non-resident in the state court, that is to say, if plaintiff takes leave to move to set the nonsuit aside. American Car & Fdry. Co. v. Kettelhake, 35 Sup. Ct. 355.

This ruling but emphasizes the purely artificial nature of diversity-of-citizenship jurisdiction, and shows at bottom how very little that has to do with the idea upon which it was constitutionally conferred. If one cannot in a court of original jurisdiction sustain his prima facie right to have a case disposed of in its ordinary jurisdiction, there ought to be a prima facie presumption that a defendant joined

STATUS OF EMPLOYES WHILE RIDING IN EMPLOYER'S CONVEYANCE.—PART I.*

When an employe is injured it is important to know in what relation he stood towards the employer at the time in order to determine the nature of the employer's duty towards him, and his consequent liability. In the majority of cases the relation is plain, but occasionally the question arises, and when it does it often determines absolutely the right of recovery. This question frequently becomes important where an employe is injured while riding in the employer's conveyance. It may be necessary to determine whether, at the time an employe was injured, say, in an elevator, he was acting in the capacity of employe and consequently, perhaps, a fellow servant of the elevator operator, or was a passenger. Even, although, in such a case, the injured employe and the elevator operator were not fellow servants, if the former was simply an employe at the time, the duty of the employer was that merely of reasonable care, while if he was a passenger the degree of care required of the employer was the highest consistent with the proper operation of the elevator. For the same reason it is necessary to know the status of an employe injured while being conveyed in the employer's train, or other vehicle.

To and From Work.—Where workmen are employed to work at a certain place, and are transported to and from such place by the employer, as a part of their contract of employment, the relation of master and servant continues to exist during the time of transportation.[1] It has been held that the relation continues during the transportation of the employe by the tion is beneficial both to the employe and employer.[2]

A woman employed as laundress, while being conveyed, either gratuitously or as a part of her contract of employment, from her home to that of her employer, in his conveyance, the driver being his coachman, was held to be in the service of her employer at the time and a fellow servant of the driver.[3]

The relation continues to exist during the transportation of workmen on hand-cars by their employer from the place of their work to a point convenient to their homes, although the transportation commences after the day's work is completed.[4]

Plaintiff's intestate was employed by defendant to work, with others, on a dredge stationed about the middle of a canal. The canal was about a hundred feet wide, and was filled with water. It was defendant's custom to take the employes from a nearby town to the dredge on a steam tug, but, when that was not done, the men were accustomed to walk along either one or the other side of the canal until opposite the dredge, when a boat would be sent to take them over. When the tug was out of commission, it was customary for any of the workmen who happened to be on the dredge to take a boat over to the bank and carry the men to the dredge, and that duty had not been delegated by the defendant to any particular employe. On the day in question, the tug being disabled, plaintiff's intestate, in company with defendant's chief engineer and seven other employes, walked down the bank of the canal to a point opposite the dredge, when a man on the dredge employed as a coal took a scow, which was frequently used for that purpose, and went across to the bank to take the men to the dredge. The scow contained some water, and it was leaky, and its deck was wet from rain. When some of the men had boarded the scow, two who remained on the bank, objected to getting on, and were urged to do so by the engineer, who told them to hurry up, as it was all right. All got on, the engineer being the last, and the boat was pushed off, whereupon one end dipped two or three inches under the water. The men on that end quickly shifted their positions towards the other end, which caused that end to dip, and the scow to slide from under them, precipitating them into the water, causing deceased and another to be drowned. Held, that deceased was in the service of the defendant at the time of the accident, and the latter was bound to exercise reasonable care in transporting him to the dredge; that no negligence was shown in this respect, and any negligence on the part of the employe who operated the boat in selecting a boat or in failing to pump it out was that of a fellow servant, for which the defendant was not liable; but that, as the Employers' Liability Act[5] renders the employer liable for injury to or death of an employe caused by the negligence of any person in his service entrusted with any superintendence or authority to direct, control or command any servant in the performance of the latter's duty, and it was shown that the chief engineer was entrusted with such authority, defendant was liable for his negligence in directing the men to get on the scow until it was overloaded.[6]

This rule applies, however, only when

gratuity, or allows him to ride home in one of his vehicles, which, perchance, is driven in the direction of his home, or if the employer and employe, in going to or from work, chance to ride in the same car, and the former pays the latter's fare, the rule above stated does not apply.

So, a workman is not in the service of the employer when he is riding in the employer's conveyance for his own pleasure or on his own business, although he may be riding free of charge.[7]

Elevators.—In the case of Putnam v. Pacific Monthly Co.,[8] it appeared that, for the purpose of its business, the defendant occupied the fourth floor of a building, and had the exclusive control and management of an elevator, operated by one of its employes and used by the general public and its employes. Plaintiff's decedent, a young lady, was employed by defendant as stenographer, and on the morning in question, while in the elevator for the purpose of going to her work, was killed by the negligent operation of the elevator by the employe in charge. The jury found in favor of plaintiff, but on appeal judgment rendered on such verdict was reversed with directions to the lower court to enter judgment of nonsuit, on the ground that at the time of the accident deceased was acting in her capacity as an employe of defendant, and that she and the elevator operator were fellow servants.

Upon a rehearing of the case before the court en banc the judgment was modified to the extent of holding that the relation of carrier and passenger existed between the deceased and defendant at the time of the accident, and hence the doctrine of fellow servant did not apply, and the degree of care owed deceased was the highest consistent with the efficient operation of the elevator, and not that of reasonable care, which is due from an employer to an employe.[9] In this connection, the court on rehearing said: "At the time of the accident her time was her own. She was not the servant of the defendant until it was time for her to begin such service. * * * Primarily the elevator was built and operated for the use and benefit of the defendant. If it enabled persons having business with defendant, or its tenants, to reach the various floors of the building with less exertion, or more expeditiously, this was a profit to defendant in the way of an increased number of tenants, customers, or business. If it enabled employes to get from one floor to another more expeditiously; this would also be a matter of convenience and profit to defendant. It was placed there just as a stairway would have been, and for the same purpose, namely, for the use and profit of the employer."

While the final judgment of the court in this case appeals to one as being correct, its argument strikes one even more forcibly as being irrelevant. It is deemed quite unnecessary to cite authority in support of the proposition that the relation of master and servant in respect of the duties and obligations of the master may exist prior to the time for commencement of work, although such time may be at the arbitrary disposal of the employe. It is also true that in some cases courts seem to have resorted to the microscope to find excuses for holding that the relation did exist at the time of an injury in order to apply the fellow servant doctrine to defeat the employe's action. In the present case we have an employer who happens to own or control the building in which its offices are located. In that building it operates, as ing is entirely distinct from its capacity as employer, or its capacity as the owner of a business which it carries on in the building. This is true, regardless of the fact that the primary purpose in erecting the building may have been to accommodate that business, because the defendant has made it true by converting a portion of the building into a public or quasi-public building inhabited by tenants. The corridors, stairway, and elevator of the building were not parts of the place of employment of deceased, any more than they were parts of the places of employment of employes of other tenants in the building. The ownership and management of the building constituted a separate business from that carried on by the defendant on the fourth floor of the building, and the elevator operator and deceased were employed in different enterprises as certainly as if they had been in the service of different employers. If deceased had been injured while riding to her place of employment on a street car owned and operated by defendant, we would have a parallel case with the one under consideration.

It is not meant to say that the relation of master and servant may not exist between employer and employe before the latter comes upon the place of his employment; or that it may not exist while the employe is being transported to his place of work. Such questions depend upon the circumstances of the particular employment. What is said in respect of this case is meant to apply to the facts of this case alone. It is thought that the cases mentioned following in which the relation was found to exist are easily distinguishable from this case.

employes while so using the elevator and the employer was that of master and servant.[10]

In Watt v. Murphy[11] the janitor of a building in which there was an elevator used that appliance himself and was killed in the operation of it. It was declared that he was a servant and not a passenger, and that the master was bound to use only ordinary care in providing a safe place for him to work, although it be an elevator.

In McDonald v. Simpson[12] a saleswoman in a mercantile establishment was going in an elevator to get her street clothes at the end of her day's work and was injured. It was held that she was a servant at the time the injury occurred.

Where an employe was injured by the fall of a freight elevator in a building occupied by his employer, on which he was taking some boxes from the third to the first floor in compliance with the express directions of his foreman, it was held that he could recover, although acting in the course of his employment, because of the defective condition of the elevator.[13]

In McDonough v. Lanpher[14] the employes of the defendant, who used the whole of a five-story building were permitted to ride in the freight elevator to and from their places of work, although they were not required to do so. It was held that while so riding they were in their capacity as employes.

Railroad Employes.—It is a rule of law that, "One may be both a passenger and an employe of a railroad company; an employe when passing over the road at a time when actually engaged in performing duties for the company, but a pas-from one place to another, even though continuing all the while in a popular sense in the employment of the company."[15]

It has been declared that the capacity in which a railroad employe is to be regarded while he is riding on the master's train depends upon whether or not his duties to his employer required him to ride on the train. "If his time, at the instant of the injury, did not belong to the master, and if his contract of service did not contemplate that he should ride on defendant's cars as a means of furthering his master's business, then he was not a fellow servant, but a passenger."[16] This statement does not contemplate those instances in which the employe may be a licensee or a trespasser.

The mere fact that there is a custom among railroad employes to board trains or engines to ride home after their service for the day has ended, is not sufficient to make them passengers. It must appear that such conduct was because of and a part of their contract of employment, because the relation of carrier and passenger rests upon a contract, either inherent in the contract of employment, or an independent agreement for transportation.[17]

A station agent riding home on a passenger train of his employer, by permission of the conductor, five hours after his day's work was ended, was held not to be in his capacity as employe.[18]

One employed by a railroad company in a gravel pit, whose employment ceased at 6 o'clock in the evening, after which time the employer had no control over him, and who was injured while alighting from an engine on which he had been allowed to ride home after his work for the day was ended, was not, at the time of such injury, a servant of the company, although it permitted him to ride home on the engine."[19] "The mere fact," said the court, "that he was permitted, if he so desired, to ride upon the engine to a place near his home did not prolong his hours of service or make him a fellow servant of the engineer."

Plaintiff's decedent was a conductor in the employ of defendant and was killed while riding on the engine of a train on his way home after he had brought his own train into the division point and had registered his arrival. Held, that neither the relation of master and servant nor of carrier and passenger existed at the time of the accident.[20]

Where one employed in defendant's railroad yard as a car checker was in the habit of riding the cars when any of them in the train he was checking were moved, and riding to the office after he had finished checking to put his book away, and it was convenient and necessary to expedite his work that he should ride the cars, and it was customary for the employes in the yard to ride when they wanted to, and he was never told to ride to the office, but was told to ride the cars that were shifted when he was working on them, it was held that, while riding on a train to the office, after his work of checking that day was finished, to leave his book, after which he would be off duty, he was merely a licensee.[21]

In an action to recover for personal injuries it appeared that the plaintiff had been employed by the defendant to assist in the ballasting of its road; that it was his duty to assist in loading stone on cars at a quarry, and then to ride on the cars to the point of distribution, and there unload the stone. When plaintiff

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(15) Harris v. City & E. G. R. Co., 69 W. Va. 65, 70 S. E. 859, quoting from 5 A. & E. Ed. 516.

(16) Harris v. City & E. G. R. Co., 69 W. Va. 65, 70 S. E. 859.

(17) Dodge v. Chicago Great Western R. Co.

(19) Baird v. Northern Pac. R. Co., (Wash. 1914), 138 Pac. 325.

(20) Dodge v. Chicago Great Western R. Co.,

had been so employed only a few days, he, with other employes, was accompanying the loaded cars, which were being pulled by an open motor car, and, upon nearing a railroad crossing, he was told that it was his time to turn the derail. Having had no experience in doing this, he went to the front of the motor car to see how it was done. After the derail was turned, and while the cars were moving three or four miles an hour, plaintiff, who was cold, concluded to return to the rear end of the car, where he would be better protected. While he was walking back along the running board the car gave a jerk which threw him off, or he slipped off in some manner, and his foot was crushed by the car wheels. In meeting the contention that the plaintiff, at the time he was injured, was a mere volunteer, the court said: "We are not inclined to hold that, because plaintiff at the time he was injured was not actually engaged in performing some active service for defendant, he is to be treated as a mere volunteer, and therefore not entitled to recover. It was a part of his duty to ride on the car from the quarry to the place where the stone was to be distributed. Being on the front of the car, we think he had the right to walk along the running board provided for that purpose in order to get to the rear end of the car, especially in view of the fact that the night was cold, and he could be better protected from the inclement weather at the rear end of the car. In doing this however, it was his duty to exercise ordinary care for his own safety, and the fact that he was so engaged did not relieve the defendant from liability for a failure to use ordinary care in the operation of the car."[22]

Plaintiff and others were employed by defendant railroad company to do work on a mountain, and were transported by work and the base of the mountain, where they boarded. Generally this transportation was by train, but shortly before the time in question they commenced the use of slide boards, by which they descended on the track by gravity. While descending on a slide board plaintiff was injured. It was held that he was not a passenger; the trip down the mountain being a mere incident of his employment.[23]

A laborer employed to repair the track of a railroad company at a place several miles from his home, rode with other laborers each morning and evening to and from the place of work on a gravel train of the company. This was done with the consent of the company, and for mutual convenience; nothing being paid for the passage by the laborers, and the company being under no contract to convey the laborers to and from their work. Held, that the relation of master and servant existed between the company and the laborer during the time the latter was being conveyed to and from his work.[24]

In this case the court said: "If the plaintiff was by the contract of service to be carried by the defendants to the place for his labor, then the injury was received while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining an injury from the negligence of other servants. If it be not properly inferable from the evidence that the contract between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his labors, and is equally connected with it and the relation of master and servant."

An employer arranged with certain employes to transport them to its works on Monday and return them home Saturday of each week, by way of its railroad. No fare was charged them, but their wages did not commence until they reached the works, and ceased when they left them. While being so transported an employe was injured. Held, that he occupied the position of servant at the time.[25]

In this case the Court disapproved the case of O'Doonnell v. Allegheny R. Co.,[26] declaring that it is not sound law. In the latter case it was declared that where an employe is carried to and from his place of work in consideration of a deduction from his wages, that he stands in the same relation as any other person paying fare, and while being so employed he is acting independently of his employment.

An employe of a railroad company who accepted an invitation to ride on one of the company's trains towards his home after his day's work was done, was held to continue as a servant during the ride.[27] The Court said that so carrying the workman was to be regarded as a privilege incidental to his contract of service.

A workman employed by a railroad company to clean switches, was held to be acting in the capacity of servant while traveling between switches on one of the company's cars, on an employes' ticket, although it was Sunday and the running of the car on that day was unlawful.[28]

A gang of workmen employed in repairing the track of a railroad company were ordered by their foreman to quit work about fifteen minutes before the usual time and board a train which would carry them to a station where they would receive their pay. This was according to a monthly custom, and they were not charged for the passage. In attempting to board the train one of the men was struck by a hand car operated by another gang of men. Held, that he was in the service of the company as a servant at the time of the injury.[29]

A railroad company engaged in ballasting its road, employed a workman to assist in loading and unloading a gravel train. In the execution of the work it was necessary for the workman to ride on the train between the gravel pit and the place of unloading. The train was run under the direction of a conductor, and the workman had nothing to do with the management of it. Held, that while riding on the train the workman occupied towards the company the relation of servant.[30]

An employe was engaged by a railroad company by the month in the capacity of baggage master and conductor of passenger and gravel trains, at such times and places as directed. He was ordered to go to a certain station and take charge of a gravel train the next day at that place. He boarded a train but passed the station he was directed to go to, and went to the next. On the following morning he was returning to the station where he had been ordered to go, when he was injured by the carelessness of an employe in charge of the train. Held, that he was to be regarded as an employe at the time, and a fellow servant of those in charge of the train.[31]

In St. Louis, I. M. & S. R. Co. v. Wiggam,[32] the rule is stated that, although an employe being transported to his place of work is not a passenger, the railway company owes him the duty to exercise ordinary care for his transportation, and he is bound to exercise such care for his own safety as a person of ordinary prudence would exercise under the circumstances.

C. P. Berry.

St. Louis, Mo.

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(25) Vick v. New York Cent., etc., R. Co., 95 N. Y. 267, 47 Am. Rep. 36.

(26) 59 Pa. St. 239, 98 Am. Dec. 336.

(29) O'Brien v. Boston, etc., R. Co., 138 Mass.

CARRIER OF GOODS—IMPROPER PACKING.

NORTHWESTERN MARBLE & TILE CO. v. WILLIAMS.

Supreme Court of Minnesota. March 5, 1915.

151 N. W. 419.

(Syllabus by the Court.)

If improper packing is apparent to the carrier or his servants, then the carrier may refuse to receive the shipment. If he does receive the shipment, he assumes to carry the goods as they are, and the full common-law liability as carrier attaches.

HALLAM, J. Plaintiff, a dealer in marble in Minneapolis, shipped a number of marble slabs by rail to the state school for the feebleminded at Faribault. Defendant is in the transfer business at Faribault. He was engaged to haul the marble from the railway station at Faribault to its destination. The marble was packed in crates, and on the way some of the crates fell from the wagon and several slabs were broken. Plaintiff sued for damages. The jury found for defendant. Plaintiff moved for judgment notwithstanding the verdict, but did not ask for a new trial, and the court denied the motion. This appeal involves only the question of the correctness of this ruling.

[1] 1. Plaintiff assigns as error certain rulings of the court in the admission of evidence and in the charge to the jury. If plaintiff were asking for a new trial, it would be proper to consider these assignments of error; but they are quite immaterial on this appeal. A party against whom a verdict has been returned may move in the alternative for a new trial or for judgment notwithstanding the verdict. G. S. 1913, § 7998. When he moves only for judgment, and rests upon that motion alone, he cannot on appeal be awarded a new trial. He has waived all errors which would be ground only for a new trial. Bragg v. Chicago, M. & St. P. Ry. Co., 81 Minn. 130, 83 N. W. 511; Krumdick v. C. & N. W. Ry. Co., 90 Minn. 260, 95 N. W. 1122; Sallden v. City of Little Falls, 102 Minn. 358, 113 N. W. 884, 13 L. R. A. (N. S.) 790, 120 Am. St. Rep. 635; Helmer v. Shevlin-Mathieu Lbr. Co., 151 N. W. 421, filed herewith. Errors in the admission of evidence or in the charge to the jury are of this sort. They present no but never to final judgment. The question before us is, not whether the case was properly tried, but whether there is any competent evidence reasonably tending to sustain the verdict. If so, the verdict must be sustained. In determining that question, every intendment will be indulged in favor of the verdict, and judgment will only be granted when the evidence is conclusive against the verdict. Cruikshank v. St. Paul Fire & Marine Ins. Co., 75 Minn. 266, 77 N. W. 958; Fohl v. C. & N. W. Ry. Co., 84 Minn. 314, 87 N. W. 919; Marengo v. Great Northern Ry. Co., 84 Minn. 397, 87 N. W. 1117, 87 Am. St. Rep. 369; Fischer v. Sperl, 94 Minn. 421, 103 N. W. 502; Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029.

[2] 2. We address ourselves, therefore, to this question of the sufficiency of the evidence to sustain the verdict. Defendant was admittedly a common carrier of goods. A common carrier of goods in general insures the safe transportation of goods committed to him for that purpose, and he is responsible for all damage to the same while in transit, unless such damage is occasioned by certain excepted causes. These excepted causes are act of God, act of public enemy, the inherent quality or "proper vice" of the articles themselves, or some act or omission of the shipper or owner. Christenson v. American Express Co., 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122; Goodman v. O. R. & N. Co., 22 Or. 14, 28 Pac. 894.

Defendant contends that this case comes within the last exception; that is, the contention is that the marble slabs were not properly packed or crated by the shipper, that when they were transferred to wagons they were loaded in the proper and practicable way and were braced in the usual and proper way by means of boards running from the top of the crates to the bottom of the wagon bed, but that they fell by reason of the fact that the crating was worm-eaten, dozy, and decayed, so that it would not properly hold the nails driven into it for that purpose.

The general rule is that, where the shipper packs articles for shipment, he cannot recover from the carrier for injuries due to improper packing. Hutchinson, Carriers, § 233; Shriver v. S. C. & St. P. R. Co., 24 Minn. 506, 31 Am. Rep. 353. Some authorities apply here the rules of contributory negligence, and hold that if the bad packing contributes in any measure to the loss or injury the carrier is not liable. 5

plication to such a case. Contributory negligence of plaintiff is a defense only in cases where the action is founded on negligence of defendant. Here the action is not founded on negligence of the carrier at all. The carrier's common-law liability is founded, not on negligence, but "on broad principles of public policy and convenience, and was introduced to prevent the necessity of going into circumstances impossible to be unraveled." Arthur v. St. Paul & Duluth R. Co., 38 Minn. 95, 100, 35 N. W. 721. It would be a distinct extension of the doctrine of contributory negligence to apply it to a case of this kind, and an extension which we believe to be unwarranted. On proof of the contract of carriage and of loss or damage, liability is prima facie established. To relieve himself from liability, the carrier must prove that the loss or damage arose solely from one or more of the excepted causes, and it avails him not to show that the shipper was negligent, if the loss or damage would not have resulted, except for the concurring fault of the carrier. The proof must bring the case "entirely and perfectly within the exception." This view is sustained by the weight of authority. McCarthy & Baldwin v. Louisville & Nashville R. Co., 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29; Hutchinson, Carriers, § 333; 1 Moore on Carriers, 559; Elliott, Railroads, § 1492.

[3] 3. It is admitted that defendant discovered that the condition of the crating was defective at the time the marble was loaded on his wagon. It is claimed he thereby assumed all the responsibility of carrying it in its defective condition. There is some authority for the proposition that the full duty of the carrier is simply to carry goods in the condition offered, though the defect in loading or packing is apparent, and that if in such case injury results from such defective loading or packing the carrier is relieved. Ross v. Troy & Boston R. Co., 49 Vt. 364, 24 Am. Rep. 144. See Union Express Co. v. Graham, 26 Ohio St. 595. The better and the more general rule seems to be that, if goods presented for carriage are not properly packed, and that fact is apparent to the carrier or his servants upon ordinary observation, then the carrier may refuse to receive the goods in that condition; but, if he does see fit to receive them, he assumes to carry them as they are, and his full common-law liability as carrier attaches to the contract of carriage Blatchf. 266, Fed. Cas. No. 3,593; Klauber v. American Express Co., 21 Wis. 21, 91 Am. Dec. 452; Atlantic Coast Line R. Co. v. Rice, 169 Ala. 265, 52 South. 918, 29 L. R. A. (N. S.) 1214, Ann. Cas. 1912B, 389; Hannibal Railroad v. Swift, 12 Wall. 262, 20 L. Ed. 423; 1 Moore on Carriers, 559.

[4] 4. It cannot be said, however, that the carrier must, at his peril, know that the goods are not in fact safely packed. The shipper usually knows better than the carrier the manner in which the goods have been packed and the manner in which they should be packed, and even though the carrier may have knowledge of some defect in the packing, still if it is not apparent to the ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take the chances of injury from improper packing. See Jaggard, Torts, 1064; McCarthy & Baldwin v. Louisville & Nashville R. Co., 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29. It is right here that we think the evidence in this case presents a question of fact for the jury to determine whether it was manifest to the defendant that the marble could not be carried with safety in the manner in which it was crated.

The motion for judgment was therefore properly denied, and the judgment is affirmed.

HOLT, J., took no part.

NOTE.—*Contributory Negligence of Shipper in Improper Packing.*—It must be considered settled that a carrier has the right to refuse to receive for transportation goods that are improperly crated or packed. 4 Elliott, Railroads § 1466; 1 Hutchinson, Carr. §§ 143, 145. There arises the question what is the liability of the carrier, where it accepts for transportation such goods? There seems to be a view with regard to such goods, where the improper packing or crating is apparent, and where it is not apparent.

It has been held that if two many live fowls are packed in a crate, the loss for such a reason falls on the shipper. But this was a case in which it was said in effect that the overpacking was not apparent. Cohn v. Platt, 95 N. Y. Supp. 535. The same may be said where a demijohn of whisky was packed in a champagne case intended to carry separate bottles. Morris v. Wier, 46 N. Y. Supp. 413. And where fruit trees and berry plants are shipped, the fact that the packing could not keep them for more than three days was not evidence of an apparent improper packing in a journey to last longer than that. Farmers' Nursery Co. v. Cowan, 21 Sup. Ct. 192. And a dog with a leathcrate. Atlantic C. L. R. Co. v. Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A., N. S., 1214.

In this case the court said: "In this instance the character of the shipment, viz.: live animals in a box or crate, and their natural propensity to escape confinement, were known to appellant's (railroad's) servants. The tender for transportation was of these animals, and not, primarily, of the box or crate, which was but a means to conserve convenience of custody and handling and the safety of animals within it. If the dog had been leashed with cords attached to a heavy block, there would have been in principle, no difference. If that had been the means employed, the carrier could not, after acceptance of the shipment, have answered, when impleaded for the loss or injury to the animal that the cord was too sleazy to serve the purpose, and hence that the shipper was negligent in that regard, with the result that he could not recover for the loss or injury."

This case relied on Hannibal & St. J. R. Co. v. Swift, 12 Wall. 262; 20 L. ed. 423, as an apparent improper securing of an animal offered for shipment.

In Calender-Vanderhoof Co. v. Railroad, 99 Minn. 295, 101 N. W. 402, it was held not contributory negligence by shipper to pack apples in bulk in an ordinary box-car instead of in barrels, or in a refrigerator car, where they were liable to encounter frost. But the carrier was found to have done all it could to save the apples in the condition in which they were shipped, and for this reason there was evidence tending to show exoneration and a new trial was ordered.

In Revilla Fish, etc., Co. v. Am. & S. Co., 77 Wash. 49, 137 Pac. 337, it appears to have been held that improper packing does not constitute contributory negligence, nor does acceptance make the carrier liable just as if goods were properly packed, there being no bill of lading issued until after shipment had begun. The carrier might be liable or not, according to the terms of shipment or their modification.

It was held in a Texas case that improper loading of perishable freight by direction of shipper did not as matter of law constitute contributory negligence on his part, the carrier having the duty to properly load it. St. L.-S. W. R. Co. v. Waldert Gro. Co. (Tex. Civ. App.) 144 S. W. 1194.

Many cases of animal shipments hold that it is contributory negligence for a shipper to so ship them that they escape and if loss arises therefrom it is the shipper's loss, irrespective of the question of carrier's acceptance. St. Louis, etc., R. Co. v. Law, 68 Ark. 218, 57 S. W. 258; Chapin v. Railroad, 79 Ia. 582, 44 N. W. 820; Susong v. Railroad, 115 Ga. 361, 41 S. E. 566.

And it seems doubtful whether the rule applied in an animal case, as by the Rice case *supra*, is entirely consistent with the rule declared in a prior decision by the same court as to other goods, it being held that if the proximate cause of their being lost was negligence by shipper in marking or packing. Broadwood v. Express Co., 148 Ala. 17, 41 So. 769. If a shipper on his own side-track loads a car, improper loading resulting in loss makes it his loss. Penn. Co. v. Kenwood

If shipper undertakes to ice a refrigerator car, the carrier may assume he will do this properly. Railroad v. Reyman, 76 N. E. 970, 166 Ind. 278.

A shipper is not responsible for cars being insufficiently iced, before their departure, by the company, though he is aware thereof, if he had no opportunity to remedy the situation. Johnson v. Railroad, 133 Mich. 596, 95 N. W. 724.

Upon the whole, it seems to us, that if loss is directly attributable to shipper's fault in improperly packing or crating, mere acceptance by carrier does not put upon it any more than the duty to care for the property in the condition in which it is delivered to it. C.

JETSAM AND FLOTSAM.

SINN AND HELL DIVORCED.

That the Bible is not a closed book to lawyers, or at least to law editors, is abundantly proven by the unusual interest taken by many of our contemporaries in the following headline that appeared in one of the St. Louis papers: "Two Women Set Free from Sinn and Hell."

While this startling announcement was hardly justified by the two very prosaic divorce proceedings to which attention was thus attracted, yet some of our contemporaries seriously argued that Hell has by this decision been judicially located in St. Louis.

Quite the contrary, as it seems to us. The St. Louis courts, in dragging a woman away from Hell has accomplished something that judges in other jurisdictions would shrink from attempting, feeling perhaps that they had no right to do for another what they could not do for themselves.

Another contemporary observes that one woman got Hell when she married in St. Louis. But that does not prove that some women who marry in other cities do not share the same fate.

At any rate, Sinn and Hell have discovered that the hand of the law is against them in St. Louis, and they both will be more careful hereafter in snaring their game in that city.

BOOK REVIEWS

BRANSON'S INSTRUCTIONS TO JURIES.

This book by Mr. Edward R. Branson, of Springfield, Illinois, Bar, is a very excellent volume both for the introductory part in which in the very full annotation of authority for its text. The style of the author, too, is concise, clear and illuminative. It is divided into eight chapters treating Nature and Purpose of Instructions; Provinces of Court and Jury; Subject-matter; Form and Arrangement; Pertinency; Interpretation and Effect; Requests and Exceptions. A careful study of this introduction should greatly help in using the forms which follow as precedents.

The forms of which we speak are admirably selected and being arranged in alphabetical order according to the nature of the cases in which they have been given this makes them readily accessible.

The volume before us is in flexible leather and the pages are of imported india paper, making it a book easily carried around by practitioners journeying from home or from offices to the court room, it besides being of pocket size. We may say also the forms refer to no less than 86 headings and under these are many subheads and in their number run above 2,000, covering over 1,000 pages. We think that a lawyer would have a very extraordinary case if there is no precedent among them that would be of no assistance to him.

This volume is of excellence in its general make-up and comes from the well known house of the Bobbs-Merrill Company, Indianapolis, 1914.

NEW JERSEY EMPLOYERS' LIABILITY LAW.

This act provides an elective workmen's compensation law and this book is chiefly valuable for its consideration of cases under the British Workmen's Compensation Act of 1906, many of the provisions of the British act being the exact counterpart of or similar in language to that used in the New Jersey law.

This work is by Mr. Wm. E. Holmwood, of Newark bar, and the review of cases given is quite thorough. This branch of the law is greatly in the formative stage and a very interesting field for study is being opened up.

The book gives not only the New Jersey act in full, but also the British statutes, so that the English cases may be well understood and the law of a particular state be considered as or not it was adopted with British construc-

HUMOR OF THE LAW.

A lawyer badgered a witness as to whether a certain relative was dead or alive.

"Oh, put it this way," drawled the witness, "we buried him a month ago on suspicion."

An American motoring through a small Scotch town was pulled up for excessive speed.

"Didn't you see that notice, 'Dead Slow?'" inquired the policeman.

"'Course I did," returned the Yankee, "but I thought it referred to your durned little town!" —London Evening Standard.

Mrs. Brady: "Och, Missus O'Toole, yez be worrukin' noight an' day."

Mrs. O'Toole: "Yis, Oi'm under bonds to kape the pace for pullin' the hair o' that blaggard, Missus Murphy, an' the magistrate told me that if Oi touched her again he'd foine me tin shillings."

Mrs. Brady: "An' yez worrukin' hard so's to kape outer mischief?"

Mrs. O'Toole (between her teeth): "No, Oi'm saving up to pay the fine."

Theophilus Harrington, a Vermont judge in the early part of the last century, was a man who loved the right and cared little for mere legal quibbling. "If justice controls your verdict," he would often say to the jury, "you will not miss the general principles of the law."

At one trial, when the possession of a farm was in question, the defendant offered a deed of the premises to which the plaintiff's lawyer, Daniel Chipman, objected, because it had no seal.

"But your client sold the land, was paid for it, and signed the deed, did he not?" asked the judge.

"That makes no difference," said Chipman, "the deed has no seal, and cannot be admitted in evidence."

"Is anything else the matter with the deed?" asked the judge.

"I don't know that there is."

"Mr. Clerk" said the judge "give me a

WEEKLY DIGEST.

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Adverse Possession**—Color of Title.—Where plaintiff took possession of the land in controversy as soon as he received his deed thereto, defendant, who received the deed under which he claimed the premises thereafter and ousted plaintiff, cannot rely upon the adverse possession of his predecessor in title, where his deed was not color of title to the land in controversy.—Southern Iron & Steel Co. v. Stowers, Ala., 66 So. 677.

2. **Assault and Battery** — Justification.—Where a person in charge of premises requests another to leave, whom he has a right to so request, he may use such force as is necessary to remove such other, after allowing him a reasonable time to depart, without becoming liable for assault.—Jones v. Bynum, Ala., 66 So. 639.

3. **Assumpsit, Action of**—Overcharges. — A shipper's claim against a carrier for freight overcharges, being founded on an executed consideration, might be declared on upon the common indebitatus counts.—Priebe v. Southern Ry. Co., Ala., 66 So. 573.

4. **Bankruptcy**—Chattel Mortgage.—A chattel mortgage not filed for record until eight months after its execution and one month prior to the bankruptcy of the mortgagor, held void as against his creditors under the laws of New York, and therefore as against his trustee, under Bankr. Act 1898, § 67a.—In re Palmer, U. S. D. C., 218 Fed. 74.

5.——Deed of Trust.—Under Bankr. Act, §§ 47a, 67a, a deed of trust on certain of bankrupt's assets, neither filed nor recorded as required by Rev. St. Tex. 1911, art. 6824, created no lien enforceable against the bankrupts' trustee, though mentioned in the bankrupts' voluntary petition.—Cooper Grocery Co. v. Park, U. S. C. C. A., 218 Fed. 42.

6.——Discharge.—Discharge in bankruptcy acquits obligation of bankrupts to indemnify surety on their building contract bond, though surety did not pay damage until after bankruptcy proceedings, it being a provable debt within Bankr. Act July 1, 1898, released by discharge.—Williams v. United States Fidelity & Guaranty Co., 35 Sup. Ct. Rep. 289.

7.——Estoppel.—Where, on the bankruptcy of a subcontractor, it was agreed that a material-superintend and revise under Bankr. Act, § 24, subd. "b."—Huttig Sash & Door Co. v. Stitt, U. S. C. C. A. 218 Fed. 1.

8.——Exemption.—Since, under the laws of Pennsylvania, a debtor's exemption is a personal privilege, which he may waive or lose, failure of a Pennsylvania bankrupt to surrender all his property to his trustee deprived him of the right to exemptions out of that which he did surrender.—In re Liby, U. S. D. C. 218 Fed. 90.

9.——False Representations.—Services of an attorney are not property within Bankr. Act July 1, 1898, § 17, par. 2, as amended by Act Feb. 5, 1903, § 5, excepting from a discharge of liabilities for obtaining property by false representations.—Gleason v. Thaw, 35 Sup. Ct. Rep. 287.

10.——Fraudulent Conveyance. — Where a bankrupt's mother fraudulently conveyed property to him, and he used it to purchase a hotel, the mother's transfer having been set aside as fraudulent against her creditors, and the hotel property having been sold in bankruptcy proceedings against the son, the mother's creditor held entitled to receive the balance of the proceeds, after satisfying a lien of the landlord on the furniture, fixtures, etc., and of a bank on the leasehold.—In re Benz, U. S. C. C. A., 218 Fed. 50.

11.——Insurance.—Proceeds of the insurance on a building on land conveyed to insured in fraud of the creditors do not take the place of the property destroyed by fire, and the trustee in bankruptcy of the grantor may not recover them.—Trenholm v. Klinker, Miss., 66 So. 738.

12.——Jurisdiction. — Jurisdiction of state courts to foreclose vendor's lien under Act La. No. 63 of 1890, on agricultural products in hands of a third person, was lost on dissolution of attachment under Bankr. Act July 1, 1898, § 67f, where bankruptcy proceedings were begun within four months of the attachment.—Lehman, Stern & Co. v. Gumbel & Co., 35 Sup. Ct. Rep. 307.

13.—Jurisdiction.—The act of a bankrupt partner in surrendering to his trustee property belonging to the firm did not enlarge the jurisdiction of the bankruptcy court to administer the partnership property, where the solvent partner did not consent or waive its right to administer such property.—Marnet Oil & Gas Co., v. Stanley, U. S. C. C. A. 218 Fed. 45.

14.——Liens.—Existence prior to bankruptcy proceedings of right of antecedent creditors, under Ky. St. § 1907, to set aside fraudulent conveyances does not prevent application of provisions of Bankr. Act July 1, 1898, § 67f, avoiding liens obtained within four months of bankruptcy proceedings.—Globe Bank & Trust Co. of Paducah, Ky., v. Martin, 35, Sup. Ct. Rep. 377.

15.——Liquor License.—A bankrupt's liquor license is a valuable species of property, and is subject to sale in bankruptcy proceedings.—In re Benz, U. S. C. C. A., 218 Fed. 50.

16.——Mechanics' Liens.—Under Rem. & Bal. Code Wash. § 1162, liens of laborers removing timber from land sold to a bankrupt held prior in right to a lien on the logs reserved in the vendor's conveyance, to secure payment of the balance due on the price.—In re Little Elk Logging Co., U. S. D. C., 218 Fed. 142.

17.——Secret Partner.—A court of bankruptcy in proceedings against a partnership has no jurisdiction to administer upon the estate of an alleged secret partner, when he is neither declared a bankrupt nor found insolvent.—In re Kramer, U. S. D. C., 218 Fed. 138.

18. **Boundaries**—Plats. — Where no monuments are shown contradicting the measurements given on a recorded plat, and no substantial reason shown to establish their inaccuracy, the plat must control.—Zuleger v. Zeh, Wis., 150 N. W. 406.

19. **Breach of Marriage Promise**—Aggrava-

20. **Cancellation of Instruments**—Condition Precedent.—An offer to restore the status quo on discovery of the fraud or within a reasonable time thereafter is a condition precedent to the right to sue for the cancellation, for fraud, of a deed given for a valuable consideration paid.—Kant v. Atlanta, B. & A. R. C., Ala., 66 So. 598.

21. **Carriers of Goods**—Discrimination.—Reciprocal switching arrangements between a carrier and three or four connecting lines for exchange of traffic do not remove the discriminatory character under Act Feb. 4, 1887, § 3, of the practice of the first carrier to refuse to interchange car load freight with the fourth connecting line within the switching limits.—Pennsylvania Co. v. United States, 35 Sup. Ct. Rep. 370.

22.——Limitation of Liability.—Gross disproportion between value of interstate express shipment and the arbitrary value fixed in express receipt does not prevent application of rule that carrier may, under Carmack Amendment of June 29, 1906, to Act Feb. 4, 1887, § 20, limit its liability to an agreed value to secure a lower rate.—George N. Pierce Co. v. Wells, Fargo & Co., 35 Sup. Ct. Rep. 351.

23.——Penalties.—There is no merit in objection that Act Feb. 4, 1887, § 8, and section 16 as amended by Act June 29, 1906, § 5, for allowance of attorney's fee on plaintiff's success in action for damages sustained by a shipper, is invalid as imposing a penalty for failing to pay a debt.—Meeker v. Lehigh Valley R. Co., 35 Sup. Ct. 328.

24. **Carriers of Goods**—Special Privilege.—Shipper held not entitled, as a matter of right, to mill grain in transit and forward the milled product under the through rate in force from the point of origin to ultimate destination; "milling in transit" being a special privilege allowable upon extra compensation under the direction of the Interstate Commerce Commision.—Priebe v. Southern Ry. Co., Ala., 66 So. 573.

25. **Carriers of Passengers** — Announcing Stations—Announcement of stations so as to give passenger information a reasonable time before he is to get off, and general announcement in the usual manner, if with due care, held sufficient.—Central of Georgia Ry. Co. v. Crane, Ala., 66 So. 604.

26.——Evidence.—As between a passenger and the conductor, who cannot know what passed between the passenger and ticket agent, the ticket held by the passenger is the sole evidence of the passenger's rights under the contract of carriage.—Louisville & N. R. Co. v. Maxwell, Ala., 66 So. 669.

27.——Negligence.—It is not negligence for a conductor, after assisting a passenger from one car to another to enable her to get a seat, to fail to assist her down the aisle to a seat; she not being weak or sick, the speed of the train not being excessive or unusual, and the curve in the road, reached while she was walking, not being sharp.—Plummer v. Washington B. & A. Electric Railway Co., Md., 92 Atl. 536.

28. **Chattel Mortgages**—Crop Liens.—Where a tenant executed a mortgage on the crops grown on the leased land during 1910 and every year thereafter until the debt was paid, the mortgagee acquired the legal title to all crops grown on the land for 1910 and the equitable title to crops grown thereafter during the life of the lease.—Whaley v. Bright, Ala., 66 So. 644.

29.——Payment.—Where a chattel mortgagee foreclosed, and after the period of redemption replevied the chattels, and the mortgagor then procured the sum due, which the mortgagee received, and indorsed on the mortgage, "Payment in full," the transaction was a payment of the note and mortgage.—Augustus Perow Co. v. Lewiston Security Co., Me., 92 Atl. 516.

31.——Employers' Liability Act.—Employers' Liability Act governs action of injured employe against an interstate carrier, to exclusion of applicable state statutes, where the train on which plaintiff was riding was engaged in interstate commerce.—Toledo, St. L. & W. R. Co. v. Slavin, 35 Sup. Ct. Rep. 306.

32.——Employment in.—Where plaintiff was injured while tearing down a roundhouse, that a new one might be constructed, which would probably be used in interstate commerce, plaintiff was not engaged in interstate commerce at the time of his injury, and could not recover under the federal Employers' Liability Act.—Thomas v. Boston & M. R. R., U. S. D. C., 218 Fed. 143.

33.——Motion Picture Films.—Interstate commerce in renting and delivery of motion picture films is not unlawfully burdened by Laws Kan. 1913, c. 294, making it unlawful to exhibit motion picture films not first examined by the superintendent of public instruction.—Mutual Film Corporation of Missouri v. Hodges, 35 Sup. Ct. Rep. 393.

34.——Picture Films.—Censorship by a state board, under Act April 16, 1913 (103 Ohio Laws, p. 399), of motion picture films to be displayed in the state, is not an unlawful burden on interstate commerce, as applied to films brought in from another state.—Mutual Film Corp. v. Industrial Commission of Ohio, 35 Sup. Ct. Rep. 387.

35.——Privilege Tax.—Interstate character of business prevents a state from imposing privilege tax on business of soliciting by mail orders for intoxicating liquors from persons in other states and delivery to a carrier within the state. from the stock on hand in the state.—Heyman v. Hays, 35 Sup. Ct. Rep. 403.

36. **Conspiracy**—Intimidation and Threats.—While employes may organize for mutual protection and betterment and deline to enter the service of a particular employer, they may not use threats, intimidation, or violence against or on employers or on their employes or strangers to induce them to leave or not to enter the service of the employer.—Hardie-Tynes Mfg. Co. v. Cruse, Ala., 66 So. 657.

37.——Pleading.—Clauses in indictment charging a conspiracy to commit an offense against the United States cannot be resorted to in aid of averments of the clause setting forth the conspiracy.—Joplin Mercantile Co. v. United States, 35 Sup. Ct. Rep. 291.

38. **Constitutional Law** — Administrative Boards.—Administrative officers are not unlawfully given legislative power, by Laws Kansas 1913, c. 294, requiring motion picture films to be first approved by superintendent of public instruction, before exhibition; his disapproval being reviewable by a commission.—Mutual Film Corp. of Missouri v. Hodges, 35 Sup. Ct. Rep. 393.

39.——Board of Censors.—Legislative power is not unlawfully delegated by Act April 16, 1913, (103 Ohio Laws, p. 399), creating board of censors to examine motion picture films to be publicly exhibited, and to approve only such as are of an educational or harmless character.—Mutual Film Corp. v. Industrial Commission of Ohio, 35 Sup. Ct. Rep. 387.

40.——Classification.—Laws 1914, r. 120, § 2, imposing upon motor vehicles and motorcycles a tax upon the privilege of using the public road, is not bad as adopting an unreasonable and unnatural classification.—State v. Lawrence, Miss., 66 So. 745.

41.——Criminal Publication.—Rem. & Bal. Code Wash. § 2564, making criminal editing of printed matter advocating disrespect for law, held not a violation of Const. U. S. Amend. 14, as an unjustifiable restriction of liberty.—Fox v. State of Washington, 35 Sup. Ct. Rep. 383.

43.——Hours of Labor for Women.—The state may forbid women employed in hospitals from working longer than certain hours, as is done by St. Cal. 1911, p. 437, amended by St. Cal. 1913, p. 713, without imposing similar restrictions on women in similar employment elsewhere.—Bosley v. McLaughlin, 35 Sup. Ct. Rep. 345.

44.——Obligation of Contract.—The requirement of Laws 1907, c. 127, that notices of redemption shall be recorded rather than filed, held not unconstitutional as impairing the obligation of the mortgagor's contract, even if constructed to apply to mortgages existing when it was passed.—Heitsch v. Minneapolis Threshing Mach. Co., N. D., 150 N. W. 457.

45.——Penalties.—A penalty of from $300 to $600, imposed by the so-called Ohio "run-of-mine" or "anti-screen" law, for each separate violation of the act, is not so great as to render the statute a violation of the equal protection of the laws under Const. U. S. Amend. 14, by preventing resort to the courts to test constitutionality of the law.—Rail & River Coal Co. v. Yaple, 35 Sup. Ct. Rep. 359.

46. **Corporations**—Collateral Attack. — Legal existence of a corporate seller of goods cannot be collaterally attacked by objection, in a suit for the price, that the corporation had organized in violation of Act July 2, 1890, forbidding combinations in restraint of interstate commerce.—D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 35 Sup. Ct. Rep. 398.

47.——Jurisdiction.—Where a property of a quasi public corporation in the hands of a receiver in foreclosure could not be operated except at a loss, the court had jurisdiction to order its sale without redemption before final decree.—Webber v. Miner, Mich., 150 N. W. 305.

48.——Pleading.—In an action against a master for an assault and battery committed by his superintendent, where an amendment, already allowed, correctly gave the name of the corporation defendant, as affirmed by its plea, its plea nul tiel corporation was properly stricken. —Central Foundry Co. v. Laird, Ala., 66 So. 571.

49. **Courts**—Appeal and Error.—Failure to raise in state courts federal questions on rulings that certain state statutes of limitations barred the relief sought defeats appellate jurisdiction of the federal Supreme Court, where limitations were in express terms stated in the demurrer to bill, sustained by the trial court.—Olympia Min. & Mill. Co. v. Kerns, 35 Sup. Ct. Rep. 415.

50.——Domicile.—Where a citizen's wife has justifiedly left him and removed to another state, with no intention of living elsewhere, she acquired a domicile in such state, so that she may maintain an action in the federal courts against a citizen of the state in which her husband resides.—Fitch v. Huff, U. S. C. C. A., 218 Fed. 17.

51. **Courts**—Frivolous Appeal.—An objection that Act Feb. 9, 1909, § 2, punishing the receipt, concealment or facilitation of transportation of opium, is unconstitutional, is too frivolous to serve as a foundation for writ of error.—Brolan v. United States, 35 Sup. Ct. Rep. 285.

52. **Criminal Law**—Practice.—Where the court excluded the jury while hearing evidence on the questions whether a confession was voluntary, the state, on the jury being recalled, must, in introducing the confession, reintroduce the testimony presented to the judge.—State v. Rogers, S. C., 83 S. E. 971.

53. **Deeds**—Description.—Where a grantor conveys a certain quantity of land in a larger tract without describing the boundary, the pre-res ipsa loquitur could not be applied to raise a presumption of negligence on his part.—Western Union Telegraph Co. v. Jones, Ala., 66 So. 691.

56. **Eminent Domain**—Connecting Carriers.—Property of one carrier is not apropriated without compensation to the use of another carrier, contrary to Const. U. S. Amend. 5, by an order of the Interstate Commerce Commission under Act Feb. 4, 1887, § 3, requiring first carrier to interchange car load freight with a connecting carrier within switching limits while performing such service with other connecting carriers.—Pennsylvania Co. v. United States, 35 Sup. Ct. Rep. 370.

57.——Irregularities.—Where the court has jurisdiction of the person and subject-matter in condemnation proceedings, ejectment will not lie for mere irregularities, but only if the proceeding is void.—Sandusky Grain Co. v. Sanilac Circuit Judge, Mich., 150 N. W. 329.

58. **Equity**—Cross-Bill.—Where, in a suit to restrain foreclosure by assignees of certain notes, some of which had matured, as collateral security, the mortgagee intervened and sought to enforce his rights, he was an antagonistic party, whose rights could be enforced only by cross-bill.—Douglass v. Blake, Ala., 66 So. 617.

59. **Exchange of Property**—Damages.—In an action by an automobile company against a dealer for failure to return an old part in exchange for a new part sent to the dealer, the measure of damages held, under the custom of dealing of the parties, the value of the new part and not that of the old.—Studebaker Corporation of America v. Gollmar, Wis., 150 N. W. 442.

60. **Executors and Administrators**—Attorney Fees.—On a claim by an administratrix for expense in employing attorney to prosecute claim for the death of decedent, held, that the court erred in allowing her more than one-third of the sum for which the suit was settled.—In re Munger's Estate, Iowa, 150 N. W. 447.

61.——Pleading.—A declaration against a personal representative on a joint and several demand against a decedent and another may set forth the demand as if it had been a cause of action against decedent alone.—Citizen's Trust & Guaranty Co. of West Virginia v. Young, W. Va., 83 S. E. 1007.

62. **Fraud**—Evidence.—To support an action for deceit concerning defendant's ownership of land, whereby plaintiff was induced to procure a conveyance of a lot to defendant under an agreement for an exchange of lands, it was not necessary that the transaction out of which the deceit arose should be evidenced by a writing. —Moore v. Whitmire, Ala., 66 So. 601.

63. **Frauds, Statute of**—Debt of Third Person.—The statute of frauds, forbidding a special promise to answer for the debt, default, or miscarriage of another unless in writing, etc., refers to contracts, not mere negotiations preceding contracts.—Gambill v. Fox Typewriter Co., Ala., 66 So. 655.

64.——Estoppel.—A lease of land for life in consideration of support of lessor, not under seal and therefore creating an estate for life, may not be repudiated by the lessor, by bringing a real action for possession, where the lessee has not breached the contract on her part, as the lease which was not required to be under seal creates estoppel against the lessor.—Calkins v. Pierce, Me., 92 Atl. 529.

65. **Fraudulent Conveyances**—Good Faith of Grantee.—Where a grantee in a deed intended as a mortgage to secure prior advances did not

67.——Independent Promise.—Where a bond not only guarantees that the employe will pay, but also that the sureties will pay, the indebtedness, it is an independent promise which is not discharged because the right of action against the employe on the principal debt is barred by the statute of limitations.—John A. Tolman & Co. v. Smith, Wis., 150 N. W. 419.

68.——Minor's Debts.—Under a contract guaranteeing payment of a minor's debt held, that the guarantor was liable for the entire amount though a less amount was due when the principal contract was disaffirmed by the minor.—National Text-Book Co. v. Mabbott, Wis., 150 N. W. 429.

69. **Health**—Inspection.—An ordinance of the state board of health for the semi-annual inspection of cows used in the dairy business to ascertain whether they suffer from tuberculosis or other contagious diseases, held valid and not unreasonable under Code 1906, §§ 2487, 2489, 2491.—Hawkins v. Hoye, Miss., 66 So. 741.

70. **Homicide**—Manslaughter.—Where an innkeeper negligently allowed a guest, to whom he had sold intoxicants after he was visibly intoxicated, to leave the inn and to attempt to get into his wagon without assistance, the innkeeper is not guilty of manslaughter, though the guest received fatal injuries in getting into his wagon.—State v. Reitze, N. J., 92 Atl. 576.

71. **Indians**—Restrictions on Alienation.—Conferring rights of majority, conformably to a state statute, on a minor Indian allottee so as to authorize him to make a lease, is beyond the power of an Oklahoma district court, notwithstanding removal of restrictions on alienation by Indian allottees by Act May 27, 1908, §§ 1, 4, in view of sections 2 and 6 of the act defining minors.—Truskett v. Closser, 35 Sup. Ct. Rep. 385.

72. **Indictment and Information**—Bill of Particulars.—Where an indictment alleged a sale of whisky on a certain date in the town of P, defendant is not entitled to a bill of particulars as to the house, square, street, or section of the town where the sale took place; defendant claiming that he made no sale at all.—State v. Doucet, La., 66 So. 772.

73. **Injunction**—Labor Unions.—While injunction will not lie to restrain members of labor unions from inducing others not to enter an employer's service by peaceable persuasion, a writ will be issued to restrain the inducing of employes to break their existing service contracts.—Hardie-Tynes Mfg. Co. v. Cruse, Ala., 66 So. 657.

74. **Landlord and Tenant**—Option to Lease.—A lease covenanting that the lessees are to have the land to build two houses thereon and to hold the land for five years, or as much longer as they may pay $50 annually, gives the lessee or his assignee options to perpetuate the lease indefinitely by paying the rent.—Thaw v. Gaffney, W. Va., 83 S. E. 983.

75. **Limitation of Actions**—Interstate Commerce Act.—The five years' limitation prescribed by Rev. St. § 1047, for the prosecutions for a penalty, does not govern a reparation action under Interstate Commerce Act, Feb. 4, 1887, § 16, as amended by Act June 29, 1906, § 4, to recover from carrier damages awarded by the Interstate Commerce Commission.—Meeker v. Lehigh Valley R. Co., 35 Sup. Ct. Rep. 328.

76. **Lis Pendens**—Evidence.—A plaintiff suing for the removal of a house on his land may introduce in evidence a judgment in ejectment to show his right to the possession as against a third person through whom defendant claimed, where judgment was rendered after the removal of the house purchased by defendant pending the ejectment suit.—Snead v. Patterson, Ala., 66 So. 664.

77. **Mandamus**—Incompetency of Judge.—

to be published in two newspapers of opposite politics in the county, where only two parties are represented and one of them by a single paper, the publisher of that paper may compel by mandamus the authorities to publish the statement in it.—Lewis County Pub. Co. v. Lewis County Court, W. Va., 83 S. E. 993.

79. **Master and Servant**—Assumption of Risk.—An employer directing two men to carry downstairs a roller weighing about 200 pounds, held not guilty of negligence, and not liable for injuries to an employe by the falling of the roller.—Seger v. Northwestern Cooperage & Lumber Co., Mich., 150 N. W. 328.

80.——Assumption of Risk.—Where a brakeman, while coupling the air hose in a freight train, was injured by the cars being violently propelled against standing cars by a switching engine in the rear of the train, in a negligent manner, plaintiff did not assume the risk.—Chesapeake & O. Ry. Co. v. Proffitt, U. S. C. C. A., 218 Fed. 23.

81.——Fellow Servant.—A railroad company providing car repairers in railroad yards with appliances with which to construct necessary scaffolds held not liable for injury to a car repairer by the fall of a scaffold erected by a coemploye.—Hook v. Great Western R. Co., Iowa, 150 N. W. 451.

82.——Fellow Servant.—Act of plaintiff's fellow servant in dropping one end of a timber about a foot as they unloaded it from a wagon, by which plaintiff was injured, held not to constitute actionable negligence of the master.—Schmit v. Frederickson, Wis., 150 N. W. 426.

83.——Instructions.—In an action against a master for an assault and battery by his superintendent, defendant's requested instruction that if the superintendent, in committing the assault, was acting from personal ill feeling, defendant was not liable, held faulty in that it did not exclude the fact that the superintendent acted within the line and scope of his authority.—Central Foundry Co. v. Laird, Ala., 66 So. 571.

84.——Respondeat Superior.—The owner of an automobile held not liable for injuries to a passenger in the car who is riding at the invitation of the driver of the car, for, as to such passenger, the driver is not the servant of the owner.—Powers v. Williamson, Ala., 66 So. 585.

85.——Safe Appliance.—When car repairer was injured by fall of car door, the questions whether defendant was under obligation to furnish a safe car door, and whether the duty of repair rested on plaintiff, were for the jury.—Bauer v. Great Northern Ry. Co., Minn., 150 N. W. 394.

86.——Safe Place.—Where a motorman in a coal mine is injured by an improperly attached electric trolley wire, the defect in which could not have been discovered by diligence, the employer is liable.—Crockett v. Black Wolf Coal & Coke Co., W. Va., 83 S. E. 987.

87. **Mines and Minerals**—Exception in Deed.—A clause of a deed "excepting therein all * * * minerals * * * which are to be held in common by all the heirs" of the grantor, held to sufficiently manifest an intent to except the minerals in the land from the operation of the deed.—Freudenberger Oil Co. v. Simmons, W. Va., 83 S. E. 995.

88.——Independent Contractor.—A mine owner, who for his own benefit procures the working of his mine by an independent contractor, need not furnish any part of the equipment for operation of the mine, unless bound to do so by agreement, or unless he has assumed to do so.—Connors-Weyman Steel Co. v. Kilgore, Ala., 66 So. 609.

89.——Withdrawal from Entry.—The president had power to make temporary withdrawal order condition as to payment depending on the exclusive dealing of the purchaser with the corporation during the following year.—35 Sup. Ct. Rep. 398.

91. **Municipal Corporations**—Joint and Several Liability.—To render a town liable for personal injuries caused by falling into a hole in the street or sidewalk, it was not necessary that it alone should be liable, as there could be a recovery against it if it was liable severally or jointly with a contractor.—Perrine v. Southern Bitulithic Co., Ala., 66 So. 705.

92.——Lateral Support.—A city, removing lateral support when making an original street grade, is not liable for injuries to abutting property, where the grading was within the street limits, and the work was not negligently done.—Schuss v. City of Chehalis, Wash., 144 Pac. 916.

93.——Notice of Injury.—Notice to city charging injury to the back of both legs, left heel, and tendon Achilles, held to justify evidence of a further injury known as "flat foot" or "broken arch."—Lowery v. City of Spokane, Wash., 145 Pac. 181.

94.——Street Grades.—Property owners could not recover against a city for destruction of sidewalks not conforming to the official grade, but could recover for lowering their sidewalks below the established grade necessary to conform to the improvements of the street.—Ludwigs v. City of Walla Walla, Wash., 145 Pac. 193.

95.——Street Obstruction.—Where private property suffers special injury from the unlawful permanent obstruction of a street by an embankment used for railroad purposes, the owner may recover, as an element of his damages, for the cutting off of his light, air, view, and access, and for any unusual noises reducing the value of his property.—Alabama Terminal R. Co. v. Benns, Ala., 66 So. 589.

96. **Negligence**—Imputability.—Where a woman riding in an automobile operated by her husband was injured from a collision with a train, the negligence of the husband could not be imputed to her.—Senft v. Western Maryland Ry. Co., Pa., 92 Atl. 553.

97.——Pleading.—A complaint, alleging that defendants carried a negro prisoner near plaintiff's house and negligently permtited him to assault plaintiff's husband and to use abusive, insulting, and profane language, whereby she was frightened and made sick and incurred medical expenses, held defective for failure to allege facts showing defendants' negligenc.—Crawford v. McMickens, Ala., 66 So. 712.

98. **New Trial**—Side-Bar Remarks.—Where, while defendant's counsel was taking an exception to argument of plaintiff's counsel to the jury, plaintiff's associate counsel said to defendant's counsel, "It begins to get home, does it?" such remark was not so prejudicial as to constitute ground for a new trial.—Sanders v. Boston & M. R. R., N. H., 92 Atl. 546.

99. **Perjury**—Departmental Reputation. — A charge of perjury under Cr. Code, § 125, may be based on false statements in affidavit required by act of Congress or authorized regulation of the General Land Office.—United States v. Smull, 35 Sup. Ct.Rep. 349.

100. **Principal and Agent**—Estoppel.—Where a third person in possession of a chattel mortgage took possession of the chattels against the protest of the mortgagor, who had paid the mortgage, and delivered the same to the mortgagee, who sold the property, the mortgagee was estopped to deny the agency of the third person.—McDougal v. Alstone, Ala., 66 So. 683.

ing for different work.—United States v. United States Fidelity & Guaranty Co., 35 Sup. Ct. Rep. 298.

103. **Public Lands**—Cancellation of Patent.—A bona fide purchase from a homestead entryman is a valid defense which grantee must establish to defeat right of government to cancel a patent as obtained by fraud.—Wright-Blodgett Co. v. United States, 35 Sup. Ct. Rep. 339.

104.——Perjury.—A department regulation that a homestead entryman must make affidavit whether he had made other entries is not repugnant to Rev. St. § 2290, as amended by Act March 3, 1891, § 5, in relation to affidavit to be made by such applicant.—United States v. Smull, 35 Sup. Ct. Rep. 349.

105. **Railroads**—Anticipation of Injury.—At grade street crossings, a railroad should use such care as is commensurate with the probability of danger and as ordinary prudence indicates is necessary to avoid injury to travelers. Craig v. Chicago, St. P., M. & O. R. Co., Neb., 150 N. W. 374.

106.——Contributing Negligence.—An elderly woman, knowing that defendant's car was late, that it was dark, and that there was no means of signaling the car, who went on its right of way to signal it and was struck by it, held negligent.—Wells v. Ann Arbor R. Co., Mich., 150 N. W. 340.

107.——Last Clear Chance.—Trainmen who knew that a track at a place is commonly used by pedestrians must keep their train in control at that place, so that after the discovery of a pedestrian on the track, they may avoid injuring him.—Northern Alabama Ry. Co. v. Guttery, Ala., 66 So. 580.

108.——Negligence.—Where defendant's engineer had seen plaintiff on a path parallel to the track, and neither the engineer nor his fireman saw her attempting to cross the track in front of the engine just prior to being struck and injured, the engineer was not guilty of subsequent negligence.—Nashville, C. & St. L. Ry. v. Vincent, Ala., 66 So. 697.

109.——Trespass.—A railroad company owes no duty to a trespasser to keep a lookout for him, or to equip its locomotives with proper headlights, or to use care to discover his presence, but is only required to abstain from wantonly and willfully injuring him.—Alabama Great Southern Ry. Co. v. Daniell, Miss., 66 So. 730.

110. **Removal of Causes**—Jurisdiction. — A state court does not lose jurisdiction of an action for death because the federal circuit court made several orders continuing the case after filing of transcript in that court and dismissed it for want of prosecution, where on the face of the record the case was not a removable one. —Iowa Central Ry. Co. v. Bacon, 35 Sup. Ct. Rep. 357.

111.——Right to Remove.—Where a foreign railroad company leased the right of way to a domestic company, the fact that the lessor company was liable for the torts of the lessee will not deprive the lessee of its right to remove actions from the state to the federal court.—Hyder v. Southern Ry. Co., N. C., 83 S. E. 689.

112. **Sales**—Breach of Warranty.—Where a buyer of paper, after knowledge of conditions as to weight which he claimed amounted to breach of warranty, accepted the paper and used it, he could not recover damages for breach of warranty.—Cheboygan Paper Co. v. Eichberg, Mich., 150 N. W. 312.

113.——Condition Precedent.—Where the subject-matter of a sale is not in existence or ascer-

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FREEDOM OF SPEECH AND BOARDS OF CENSORS FOR MOTION PICTURE SHOWS.

What a variety of questions are raised under the general clauses of our fundamental law by the ever progressive invention of our people! But as startling a one in its novelty, as we have noted, is that whereby claim is made for freedom of speech in the product of a mechanical device on a curtain in a motion-picture theater.

It is a little difficult to grasp the idea of the personality of an individual displaying itself in what a machine, that is his property, produces to the public eye and apprehension, as its thought and expression of sentiment, even though it connectedly, through its product, "points a moral or adorns a tale." Is the personality ubiquitous through and by machines, if it duplicates, if the word is allowable, the same moral and the same tale contemporaneously in different places? If it could be there, at one and the same time, but without the machine, it would be as if it were not.

But it might be answered, an author's book or our editorial could be all of this, and one copy would be as exempt from suppression as all of them under the great right of liberty of speech, and why not the motion picture?

Mr. Justice McKenna, speaking for a unanimous bench, seems to tell us why books and writings are not like motion pictures. Mutual Film Corp. v. Industrial Com., 35 Sup. Ct. 387.

He says: Moving pictures "indeed may be mediums of thought, but so are many things. So is the theater, the circus and all other shows and spectacles. * * * Counsel are said by counsel to be publication of ideas, satisfying the definition of the dictionaries, that is a means of making or announcing publicly something that otherwise might have remained private or unknown, and this being peculiarly the purpose and effect of moving pictures, they come directly, it is contended, under the protection of the Ohio Constitution."

Answering this contention, the learned justice says: "The first impulse of the mind is to reject the contention. We immediately feel that the argument is wrong or strained, which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on billboards of our cities and towns, and which regards them as emblems of its public safety, to use the words of Lord Camden, quoted by counsel, and which seek to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion. The judicial sense supporting the common sense of the country is against the contention."

There are then cited cases granting or withholding licenses for theatrical performances and of moving picture exhibitions, and reference is made to the fact that only in this case has it occurred to anybody to suggest that any freedom of opinion has been repressed.

Speaking of these exhibitions generally, it is said: "They are mere representations of events, of ideas, and sentiments published and known; vivid, useful and entertaining, no doubt, but capable of evil, having power for it, and greater because of their attractiveness and manner of exhibition."

These reasons seem more persuasive than convincing, except that to understand what may be included under the general right of freedom of speech we are to look to analogous things which have been regulated his views, may only rely on vehicles of expression which distinctively portray his personality, as the tongue does or as the printing press does. He may be obscene in these things; he may be anarchistic; he may be revolutionary and what he says or does might not be regarded as overt, tangible acts, though, as in print, there may remain the evidence thereof. But, if he inculcates obscenity, anarchy or revolution by motion pictures, he produces something for the other senses than the intellectual sense, which the state in the interest of decency, order and government may regulate or suppress.

And for this the state may appoint its administrative boards and give them large discretion to the end of obtaining results which are the aim of legislation, but not in said boards legislation itself. This case says: "Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative policy may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution."

This is greatly the *argumentum ab inconvenienti,* a salutary but not always a safe rule to go upon. But, if in things subject to the police power, exact limitations on private right, are not accurately marked in legislation, it is well recognized no harm is apt to accrue to fundamental rights.

This case is also instructive in what it says as to the use of films shipped in interstate commerce. It does not precisely represent the common notion of things entering into the mass of local property exhibitors or have passed to the latter they are in consumption, and mingled as much as from their nature they can be with other property of the state." It ought to be that a film to be sold for exhibiton ought to be deemed as much in the mass of local property as a barrel of whiskey or a sack of flour in the hands of a local merchant for sale is of such mass. Of course, there are the original package cases, but as to these there was no harm to health or morals except by the exercise of the will in use by individuals. This is not so as to a lewd picture thrown on a canvas before an audience

NOTES OF IMPORTANT DECISIONS

CARRIERS—LIMITATION OF LIABILITY WHEN VALUE STATED IS MERELY ARBITRARY.—The rule of limitation of liability, when the value stated by way of limitation is merely an arbitrary sum bearing no proportion whatever to the value of the shipment lost by a carrier in transportation, was claimed not to apply in Pierce Co. v. Wells-Fargo & Co., 35 Sup. Ct. 351, decided by U. S. Supreme Court.

Frequent decision has established the principle that contracts for limited liability, when fairly made, do not contravene settled principles of the common law preventing a carrier from contracting against its liability for loss by its negligence, the leading case recognizing the validity of such contracts under the Carmack Amendment being Adams Exp. Co. v. Croninger, 226 U. S. 491, 44 L. R. A. (N. S.) 257.

But a dissenting judge in Circuit Court of Appeals, in its ruling in Pierce Co. case *supra,* took the position, that there ought to be some semblance of a valuation, and the statement of an arbitrary sum as damages which has no perceptible relation to actual value—as for example, $50 when a shipment is in actual value $15,000—is in reality no limitation upon liability at all, but, virtually, an absolute release from all liability.

Mr Justice Day speaking for eight out of acceptance of the same by the parties as the basis of shipment, and by force of the statute as to the filed tariff and the requirement of the tariff to take notice of its terms and to be bound thereby."

As we understand this ruling, there really was no necessity for the express company to state anything more than a nominal value—say, one cent—in a receipt and the shipper would be bound thereby. But the Interstate Commerce Commission does not seem to think this way, as while the above suit was pending it was ruled that the $50 valuation shall not apply to shipments weighing more than 100 pounds. 28 Inters. Com. Rep. 137, 138. This ruling by the Commission is equivalent to saying the valuation is not merely nominal, but does bear some, though a merely conventional, relation to actual value.

BILLS AND NOTES—ACCEPTANCE AND PAYMENT OF RAISED CHECK NOT PRECLUDING RECOVERY FROM HOLDER.—St. Louis Court of Appeals holds that, though it be true that a drawee bank paying a forged check is precluded from recovering from a holder in due course, this is not true where it pays a raised or altered check. McClendon v. Bank of Advance, 174 S. W. 203.

Admitting the old rule to be true, that money paid in each instance is upon a mistake of fact and the bank is denied recovery under the principle decided in Price v. Neal, 3 Burr 1354, and incorporated in Negotiable Instruments Law, that drawee is bound to know the signature of drawer, and that it has been held that the mistake in the latter case is subject to no such exception, yet it reasonably may be contended, we think, that Negotiable Instruments Law, in its general scope, intended to cover the latter case also.

The learned judge referred to the relevant section of this law, but he does not quote it in full. It reads: "The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance and admits: (1) The existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument; and, (2) the existence of the payee and his capacity to indorse."

It seems to us that had this section stopped at the word "acceptance," it would be clear It is familiar that if a bank on which a check is drawn certifies it, instead of paying it, it can interpose no defense to its payment. Carnegie Trust Co. v. First Natl. Bank, N. Y., 107 N. E. 693; 80 Cent. L. J. 231. Certification is but a substitute for payment and has been held to discharge the maker. Payment equally discharges him. R. S. Mo. 1909, § 10089. When these or other of these steps have been taken, it seems to us the Negotiable Instruments Law intends that none of them shall be retraced so far as any innocent holders are concerned. The St. Louis Court of Appeals cites no cases under that law.

In the case before the court, a bank was declared entitled to withhold from a depositor's account a sufficient sum to reimburse it on account of certain raised checks "that is, the amount the respective checks were raised." But if it could not tell when it paid or passed to depositor's account the full amount on the face of these checks, because that seemed according to their tenor, how did it know and in what sums they were raised? It must have been on knowledge or information obtained from the drawer. We do not think it was intended by N. I. L. that payment was to leave open between a bank and an innocent payee or indorsee a possibly disputable fact of this nature.

INDEMNITY INSURANCE—PROOF OF AS IRRELEVANT AND PREJUDICIAL EVIDENCE.—Many courts have decided, that it is prejudice requiring reversal for a trial court to admit evidence of defendant in a negligence case of his carrying liability insurance. West Virginia Supreme Court of Appeals in following such cases says: "The fact that defendant carried accident insurance for its protection could shed no light on the issue of negligence. It might tend to show that it had less incentive to be careful than it otherwise would have had. But the question of motive in a negligence case is not material; the court and jury are concerned only with the question of fact, whether defendant was negligent and not with any motive it may have had for not being sufficiently careful." Walters v. Appalachian Power Co., 84 S. E. 617.

This seems true, but there is an implied ad-ed to prove defendant's ownership and control over a certain electric wire that caused the injury sued for, otherwise it was not covered by the policy it held. The court for certain reasons held this was a non sequitur.

It was said, however, that: "Granting that, in negligence cases, the fact that defendant carried accident insurance, may under certain circumstances, be shown, as tending to prove the responsibility of the insured for the proper care and safe management of the agency causing the injury, still one of the essential prerequisites to its admission for that purpose is that the policy be proven to apply to the particular agency, the control or ownership of which the insured denies." In this way many of the cases cited by plaintiff's counsel were distinguished from the case at bar.

In one of them, it was held legitimate cross-examination to test the credibility of defendant's officer to ask him if his company would have to pay any judgment that might be recovered in a case and upon his answering in the affirmative, to ask him for the purpose of contradicting him if some other company would not have to pay the judgment? The first question was allowable to show the interest of witness, and, if answered affirmatively, the second to develop inconsistency in statement. Shoemaker v. Bryant Lumber & Shingle Mill Co., 27 Wash. 637, 68 Pac. 380.

In another case where there was a claim, that an independent contractor, other than defendant, was liable, it was held competent to ask about a policy covering injuries to the plaintiff, because "the jury could very properly infer that the defendants would not have paid for indemnity for damages for which they were not liable." Barg v. Bonsfield, 65 Minn. 355, 68 N. W. 45.

In another case it became material to show that defendants owning a building denied they were in control of the elevator therein, after they had leased apartments therein. It was held proper to allow them to be asked on cross-examination if they did not carry insurance against accidents arising in operating the elevator. Perkins v. Rice, 187 Mass. 28, 72 N. E. 323.

The rule that only the fact of negligence, and not the motive therefor, is of concern to a jury is a narrow one under our system. The second of the cases referred to by counsel for appellee shows that interest may be inquired about on cross-examination as a means of testing credibility, and, furthermore, the jury are instructed

SPIRIT OF JUSTICE.*

I

Ah, the pure, vestal call of Justice,
What wonderful legends it tells!
With its breath like a rose's fragrance,
And its voice as of tinkling bells.
Like a page in its virgin whiteness;
Like an infant's life, untold;
Like the dawn of fond hope's brightness,
When wisdom's first leaves unfold.
Ah, the joy of its gentle calling,
How it comes like a magic draught!
Like a wonderful, sweet elixir
From the ghost of wizards quaffed!

O, speak, sweet voice of Justice,
While I, in this spell divine,
May read the glowing message,
That thrills from thy heart to mine.
Come, thou hast passed through fire and revolution,
From Aurora kissed dewy dawn
To balmy twilight eve of Nations;
Through the heart-throbs of every people;
Through the valleys of sin and death;
Oh, tell me the fount of thy cleansing,
Thou Platonic Justice of man to man?

II

I have passed o'er the battle's ravage,
I have borne through the mires of sin;
Through the dark and loathsome prisons,
Where the sun cannot enter in;
I have kissed the lips of the dying,
Ere I bore their souls above;
I have mourned with the sad, in their sighing,
I have joyed with the glad in their love.
As a Seer from the distant ages,
I have lived since the world began;
I have breathed through the countless pages
Of the record of man with man.

Ah, Sir, with the dimmed vision—
When the midnight hour draws near,
And the earth, o'ercharged with ignorance,
Is a-throb in a travail of fear:
Then blacker and blacker the shadows,

Till a new day burst from the heavens,
And the old melts away from sight—
At that crucial hour, I wakened,
Like a soul that is born anew;
Bringing joy to the earth's mistaken,
Bringing courage and hope to you!

III

Thus I learned from the midnight ordeal,
That had passed while the heedless slept;
And I gleaned from crystallized opinions,
How pitiless Logic had swept
The pathway of Justice free from every deception!
And I saw how the mind o'er burdened,
And dwarfed with ignorance's despair,
May be cleansed in the mind's travailing,
Until pure as the morning air!

TROY WILSON LEWIS.
Little Rock, Ark.

STATUS OF EMPLOYES WHILE RIDING IN EMPLOYER'S CONVEYANCE—PART II.*

Railroad employe riding on pass.—Plaintiff was employed by defendant street railway company, and was injured while riding on one of defendant's cars from his place of work to his home for dinner. At the time, he was riding free of charge under a rule of defendant which permitted its employes in uniform to ride free on its cars at any time. It was held that he was a passenger, and in reaching this conclusion the court said: "His time was his own, and he owed the defendant no duties until the time arrived for resuming his work. It was no part of his duty to the defendant, as a servant, to take the car on which he was riding and go to a particular place for his dinner. He might go where he pleased and when he pleased during the interval evening to visit a friend, or to do any business of his own."[1]

A street car conductor, after finishing his day's work, asked for and received a pass at the company's office, in conformity with a general custom, boarded a car to go home, and gave the conductor of the car his pass. During the trip he was thrown from the car when it struck a curve with great force, and sustained injuries from which he died. The pass on which he was riding contained a stipulation that, "This ticket is issued to the person using the same, only on account of being an employe of the company and is voluntarily accepted as a gratuity." Held, that deceased was a passenger on the car at the time of the accident.[2]

The plaintiff's intestate was employed as an ash hauler at defendant's power plant and was paid $2 a day for his services. His working hours were from 8 a. m. to 5 p. m. It was defendant's custom to supply its employes with badges which entitled them to ride on any of its passenger cars at any time, and even when traveling on their own business or pleasure. On the morning in question deceased was riding, on his badge, to his work, when the car he was on ran into a gravel car and he was killed. The accident occurred between 7 and 8 o'clock. Held, that deceased was a passenger at the time of the accident.[3]

It has been held that a person using a bridge, by virtue of a pass given him by his employer for use in going to and returning from work, was a passenger over the bridge at such times, and was not in the capacity of employe, although the employer was the owner of the bridge.[4]

It will be noticed that in the foregoing illustrations the employe in each instance was engaged in something that concerned

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(1) Dickinson v. West End St. R. Co., 177 Mass.

himself alone; that is, something not directly in furtherance of his work. He was on his own time, disposing of his time, and acting according to his own free will, uninfluenced by his employer's authority over him. In one instance, it is true, the employe was on his way to work but he was free from the control of his employer. His employer was not concerned with whether he was riding on the street car or walking. The means he employed to get to his place of employment were of his own choosing. A different question is raised where the employe is in the scope of his employment at the time. Then, of course, the relation of master and servant exists. Thus, a civil engineer employed by a railroad company, traveling on the road on duty for the company, and on a pass furnished by the company, occupied the position of an employe at the time.[5]

Transportation part of compensation.—In Eidem v. Chicago, R. I. & P. R. Co.,[6] the law was stated to be that, "The rule is well settled that, as between an employer and employe when the employe receives transportation as a part of his contract of employment, the law requires no more than ordinary or reasonable care on the part of the employer."

A laborer in the employ of an electric railway company was to receive by the terms of his contract of employment, $1.75 a day of 10 hours and daily transportation between the city in which he worked and the town in which he lived, and in accordance therewith he was given two tickets or transportation slips at the end of each day's work. He was injured by the derailment of the car in which he was riding on one of such tickets. It was held that he was a passenger at the time of the accident and entitled to care as such.[7]

Plaintiff was employed as night clerk at of $70 a month and transportation over the company's lines. In attempting to board one of defendant's cars to return to his duties from his home, where he had gone for lunch, he was injured. Held, that he was a passenger.[8]

An employe of a railway company who was paid for his services partly in passenger tickets, was held to be a passenger while riding on such tickets.[9]

Decisions under the workmen's compensation acts.—Under the system inaugurated by the Workmen's Compensation Acts, the fact that a workman is found to have been acting in the capacity of employe at the time he received an injury generally has the opposite effect to that which it had at the common law. Under the latter system, the effect of finding that an employe was acting as such at the time he was injured, was very frequently to find that his injury was due to the negligence of a fellow servant, which defeated recovery. The Compensation Acts, on the other hand, allow recovery regardless of whether the injury was due to a negligent act of a fellow servant, or whether it was due to the fault of anyone. It is necessary to authorize recovery, however, that the injury occur while the workman was acting within the scope of his employment. The following cases fairly well illustrate the point in question.

A workman in the employ of a railroad company as engine cleaner was ordered to go to a station about four miles distant from the place he had been regularly employed. He was conveyed by the company's trains to and from the station in question without charge. On arriving at the station where he was to work he was told, upon inquiry, that there were two ways to the engine shed, by way of a bridge and by way of a subway. On the second morning wards the engine shed, and while doing so was killed by a train. It was held that there was evidence that the workman's employment commenced when he got into the train to go to his employment, and that his death was due to an accident arising out of and in the course of his employment.[10]

"It must be remembered," said Smith, L. J., in the case last sighted, "that there is a difference between the beginning of a man's employment and the beginning of his work. In a coal pit, a miner's employment begins as soon as he leaves the bank, although he may have some distance to go to his actual work after he has got down the pit. In the present case I think that it has been proved that it was part of the contract of employment between the company and the deceased workman that they should take him from King's Cross to Hornsey, and back again after the day's work was over."

The owners of a colliery furnished a train, of which they owned the coaches, but which was driven by a railway company, for the purpose of conveying a number of their employes between the colliery and their homes, a distance of several miles. Near the colliery the owners had constructed a platform on property owned by the railroad company which was for the exclusive use of the employes. The train was operated free of charge to the employes, and was run regularly between the home town of the employes and the colliery. An employe was waiting on the platform to get into a return train when he was pushed off and killed by the train. It was held that it was an implied part of the contract of service of these employes that this train should be provided by the employers, and that the colliers should have the right to travel to and fro without charge, and that the employers were liable to pay compensation for the death.[11]

"To avoid misconception," said Cozens-Hardy, M. R., "I desire to say that I base my judgment on the implied term of this contract of service, and that it by no means follows that every workman is entitled to the protection of the Act whenever an accident happens to him on his way from his home to his employer's place of business."

A fireman in the employ of a railroad company was entitled to return in the company's train from the end of his run to the station where his run commenced. At the end of his run on the day in question he boarded a train with two other men. He put his basket in the rack, at which time he was standing near the door. No one saw him do anything else, but a crash was heard and the man disappeared. The door was then shut, but the window was open and broken. He was found beside the track where he had fallen, seriously injured, and he died from the effects of the fall. It was admitted by the company that the accident happened in the course of the man's employment, but they contended that there was no evidence that it arose out of the employment. It was held that the evidence was sufficient to justify the County Court Judge in finding that the accident arose out of as well as in the course of the employment.[12]

While being transported to his work in a train by his employers, and shortly before reaching the station where he and other workmen would leave the train, a collier climbed out onto the running board of the coach so as to be ready to jump off as soon as the train arrived at the stopping place. Before the train stopped he fell off and was permanently injured. The County Court Judge held that the workman was riding on and therefore he was entitled to compensation. This finding was upheld on appeal.[13]

An engine driver was employed by a firm to go with one of their engines to do threshing and to look out for the employers' business, and to solicit business from farmers. He was paid by the hour. The employers furnished him a bicycle to aid him in his work. After the close of a day's work, and after his payment per hour had ceased, the workman started home, a distance of four miles, on the bicycle, and while riding on the road he was run into by a motor lorry and killed. While the workman was not compelled to use the bicycle, the evidence showed that no workman would work under the same conditions without one. It was held that the accident did not arise in the course of the man's employment, it being no part of his duty to ride home on the bicycle.[14]

The Master of the Rolls (Cozens-Hardy) said, in part: "The workman was under no obligation to his employers after six o'clock in the evening to move away from where he was working and to ride home on his bicycle. I cannot see what importance can be attached to the fact that he was on the bicycle at the time of the accident." Lord Justice Kennedy stated in his opinion that the fact that the use of the particular vehicle was a part of the arrangement and the term of the engagement on which the workman was employed, created considerable difficulty, although he agreed with the Master of the Rolls.

Employe about his own affairs.—In riding on the employer's conveyance the employe may have stepped aside from the duties of his employment to attend to affairs of his own, or to gratify a whim or fancy of the moment. If he is injured while so fendant railroad company, and his duties were to unload slag from cars in the yards, to roll wheelbarrows, and do various things of that general nature. He and other employes were engaged in unloading a gondola car in a train consisting of three gondola and three box cars. Before this work was completed a switch engine started with the train towards a switch, where the box cars were to be cut out and the gondolas switched back. Plaintiff and his co-laborers boarded the cars, although they did not know where they were going, and while so riding plaintiff was struck by a protruding limb of a tree growing near the track and was dragged from the car and seriously injured. There was evidence that it was a custom of the employes to go from one part of the yards to another on the switch engine and cars, and to ride from one part of the work to another. On this occasion, however, they had no work to do elsewhere. Held, that the plaintiff was not acting within the scope of his employment at the time of the accident, and that the relation of master and servant did not exist at that time. "This action on plaintiff's part," said the court, "was entirely foreign to any duty pertaining to his services, and was not designed in the remotest degree to expedite or facilitate the work in hand, nor any work in the master's behalf. It saved no time, achieved no advantage, and was in no way related to the comfort, convenience, or well-being of plaintiff. It was therefore plainly but a playful mode of passing away a few otherwise idle moments; and while thus indulging his fancy for amusement, and subjecting himself the while to dangers wholly unrelated to his services."[15]

Duty when the relation does not exist.—

others, had by permission enjoyed the privilege of riding upon the engine towards his home, after his own service had ended, he was but a licensee. Being such, and giving to the evidence all the weight and force that can be properly claimed for it, the standard of duty towards him for his protection would be that the defendant, thus permitting the decedent to ride, would be held only to the exercise of ordinary care, and that the licensee exercises the privilege at his own risk of obvious or patent dangers, and under such conditions the defendant owed him no active duty excepting upon the discovery of his danger."[16]

Plaintiff was employed as an assistant carpenter by defendant in the construction of a power plant. In connection with this work defendant operated a railroad to expedite the handling of dirt. On the occasion in question the plaintiff and several others had been let off a few minutes before the regular quitting time so that they could take some tools to the camp, at which the employes were lodged and boarded, on the company's time. As he was climbing on the engine used on the railroad mentioned, some dirt cars, which had been insecurely stayed, rolled against the engine, and caught and mashed plaintiff's leg. It appeared that plaintiff was sometimes sent to the camp for tools, and that he was always permitted to ride on the engine at such times; and that he had ridden into camp on the engine on former occasions after quitting work. It was held that, regardless of whether the relation of master and servant existed at the time between the plaintiff and defendant, the latter was still under obligation to observe reasonable care for the protection of plaintiff while on his way to camp.[17]

C. P. BERRY.

St. Louis, Mo.

DAMAGES—LOSS OF PROFITS.

YAZOO & M. V. R. CO. v. CONSUMERS' ICE & POWER CO.

Supreme Court of Mississippi. March 15, 1915.

67 So. 659.

Unless the profits of a business are so definite and certain that they can be ascertained reasonably by calculation, their losses cannot be allowed as damages at large.

REED, J. This is an action brought by appellee to recover from appellant damages which it is alleged appellee sustained when appellant spiked down and closed for use a spur track that served appellee in its business of shipping ice. The case was tried before the circuit judge, jury being waived. He rendered judgment in favor of appellee in the sum of $700, and appellant appealed.

The proof is sufficient to sustain the finding of the trial judge as to liability.

The track was closed for six days in the latter part of September, 1907. In its declaration, appellees claimed damages from: (1) Loss of gains and profits, $750; (2) loss of services of its president, $100; and, (3) amounts paid for services of attorney and for traveling, hotel, telegraph and other expenses of its attorney and president, $350.

Now as to the proof of damage. We find in the correspondence between the parties that appellee promptly made claim for payment of loss sustained. A few days after the occurrence, in a letter dated September 30, 1907, appellee sent appellant a statement of account, of which the following is a copy:

For loss on account of cutting out siding and failure to place cars for shipment of ice, Sept. 22 to Sept. 27, inclusive:	
Six days' loss at factory, at $30.00 per day	$180.00
Six days' time of W. A. Crawley, at $15.00 per day	90.00
R. R. fare, hotel, telegraph and other incidentals	50.00
Attorney's fees, including hotel, traveling, telegraph and other incidental expenses paid J. W. Cutrer	150.00
	$470.00

to arrive at exact figures as to amount of loss. He said the plant sustained a loss of $100 per day. When asked what expenses were incurred in his effort to have the obstruction removed, he answered:

"Well, I gave it six days of my time; attended to nothing else absolutely; my time, I estimate, was worth at least $15 a day—$90. I paid out for railroad fare, hotel, telegraph, and other incidentals, $50; then there is an attorney's fee, including hotel, travel, and stenographer and other incidental expenses; paid J. W. Cutrer $150; those three items make $290 expenses."

It seems from the evidence that the loss claimed was from the inability to ship bulk ice in cars which were brought to the factory over the spur track. No effort was made to take the ice to the railroad depot and there ship it. Nothing was done towards shipping except to ask that cars be placed on the track at the factory.

Mr. Crawley said that he arrived at the amount of loss of $100 per day by a mental calculation. He said this is what the company ought to have earned on its shipments. This estimate included his expenses. He did not know that the company's books would show a clear profit of $100 per day on any six days in September, 1907. Some ice was manufactured during the time. He could not say the amount. The books would show. The company's books covering the term were not introduced; they could not be found. He could not mention any particular order that he had, about that time, to be filled, but says the factory was selling its capacity during September. When asked if business was not lighter because the weather was getting cooler in the last of September, he answered, "No, sir; September we regard as one of our best ice months; everbody is having chills and fever, and then it is hot."

Mr. Steve Castleman testified for plaintiff. He said that he could not swear positively what the actual loss to the business from the closing of the spur track was, but that he had had several years' experience with the business, and from his knowledge of it, it would be anywhere from $100 to $150 a day.

Mr. Bradley, a witness for appellant, and railroad agent at Belzoni where the ice factory was located, testified that appellee's shipments of on which the factory could not fill during the six days the track was closed.

It is evident that only compensatory damages were awarded in this case. In truth, the proof does not present a case for punitive damages.

[1] The rule regarding the recovery of gains and profits lost through breach of contract was announced in the case of Railroad Company v. Ragsdale, 46 Miss. 483, and reannounced in the recent case of Crystal Ice Co. v. Holliday, 64 South. 658, and is:

"Losses of profits in a business cannot be allowed, unless the data of estimation are so definite and certain that they can be ascertained reasonably by calculation."

[2] The amount of the loss in gains and profits cannot be definitely ascertained from the evidence in this case. The proof is insufficient to establish with certainty the amount of such loss by appellee on account of the failure by appellant to operate and use the spur track. In the proof appellee claimed that the loss arising from the closing of the ice plant for six days amounted to $100 per day. It will be seen that this was only an estimate; that it was not shown from the company's books; the president said it was his mental calculation. He also said that the estimate included his expenses, though he testified that his expenses during the time were included in another item of damages. He could not mention any particular order that his company was unable to fill. In short, the testimony lacks necessary information from which a calculation could be made of the amount of loss sustained.

The only witness who testified on the subject of the amount of the company's shipments said that the company's shipments would not average one small car of bulk ice a day, such car containing about 6,000 pounds, and it is shown in the president's testimony that the company was selling ice at prices from $5 to $8 per ton. It is not shown what profits would be on the sale of ice shipped. Work in the ice plant was not suspended entirely during the six days, but its work and business continued, and the loss claimed was from the inability to ship ice in bulk in cars placed at the plant over the spur track.

We note, too, that in the declaration the loss of gains and profits was placed at $750 for the

placed the loss at from $100 to $150 a day. We do not see how the loss could be ascertained reasonably by calculation from the uncertain and indefinite testimony on the subject and the conflicting estimates given.

(3) In its claim for damages appellee includes an amount paid for services and advice of an attorney in its negotiations with appellant for reopening the spur track. It is the general rule that attorney's fees should not be recovered as part of damages unless the wrong or injury complained of is connected with some circumstance of aggravation or malice. 13 Cyc. 80.

(4) It is the rule in Mississippi that attorney's fees can be awarded in cases in which exemplary damages are given. This is supported by the decision in the case of New Orleans J. & G. N. R. R. Co. v. Albritton, 38 Miss. 243, 75 Am. Dec. 98:

"In cases, proper for the infliction of exemplary damages, the jury in estimating those damages have a right to take into consideration the probable expense of the litigation, to which the plaintiff has been subjected, in order to obtain redress for the wrongful act of the defendant; and it is therefore competent for the plaintiff to prove, before the jury in such a case, the reasonable and proper charges of his counsel."

The case at bar is not one for exemplary damages, and we, therefore, conclude that the amount paid the attorney for advice and services was not a proper item of damages.

(5) From the proof in this case we do not see that the claim for services of the president for six days at $15 per day should have been allowed. It is not shown that the services he rendered in adjusting with appellant the matter in regard to the closing of the spur track were outside the scope of his official duties and were an extra or additional expense to the company.

It follows, therefore, from our holding that the trial court was in error in fixing damages in this case.

Reversed and remanded.

COOK, J., took no part in this case.

NOTE.—*Rule for Estimating as Damages Loss of Profits in a Business.*—We may agree that to recover for loss of profits in a business, these profits must be founded on something other than jecture, or on hope; that they must be taken out of the realm of mere speculation, but what is the recognized basis for estimation entitling one whose business has been broken up or adversely there must be something in the way of contemplation in the minds of the contracting parties upon which the loss can be predicated, while in the former, there is only the consideration of proximate cause. Atkinson v. Morse, 63 Mich. 276, 29 N. W. 711; Terre Haute v. Hiednut, 112 Ind. 542, 13 N. E. 686; Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635; Squire v. W. U. Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Gas Ill. Co. v. Western, etc., Co., 152 U. S. 200, 38 L. ed. 411.

Not always, however, is there a hard and fast rule for estimating profits, but they are to be determined according to circumstances. Silberstein v. News-Tribune Co., 68 Minn. 430, 71 N. W. 622; Wright v. Mulvaney, 78 Wis. 89, 46 N. W. 1045, 9. L. R. A. 807.

When the loss of profits is in trade or business, it is generally required that the trade or business must be one previously established and it must show a productiveness in the past and a fair prospect for the future of this productiveness continuing. Terre Haute v. Hiednut, *supra*; N. J. Express Co. v. Nichols, 33 N. J. L. 434, 97 Am. Dec. 722; Bogart v. Pitchless Lumber Co., 72 Wash. 417, 130 Pac. 490.

But even this rule has its limitations according to the character of the business. For example, lost profits from continuing manufacture of machines. Jones v. Call, 96 N. C. 337, 2 S. E. 647, 60 Am. Rep. 416.

Where a business has not been entered on in pursuance to a contract, breach of such contract offers no basis for recovery of damages. Thus in Webster v. Bean, 77 Wash. 444, 137 Pac. 1013, it was said: "A clear distinction is manifest between an interruption of an injury to an existing business, which has been successfully conducted for a considerable period of time and the prevention of the establishment of an entirely new business. When the business is in contemplation, but not established, profits that may be anticipated therefrom are too speculative, uncertain and conjectural to become the basis for the recovery of damages in an action for the subsequent loss of such profits."

This principle has been applied, where there was breach of contract to erect in an office building an elevator. Winslow Elevator Co. v. Hoffman, 107 Md. 621, 637, 69 Atl. 394, 17 L. R. A. (N. S.) 1130. It was said the profits in such case depended upon: "What rent they might have received from the building as not only dependent upon collateral engagements with persons who might rent rooms, but upon many other considerations, such as location, desirability of rooms, amount of rent asked, light and air, competition of other buildings, the number of tenants, the ability of the owners to keep the rooms occupied and the general character of the management of the building. There are so many elements of uncertainty which enter into and affect the question that any estimate of loss could be little short of a guess."

But if an agreement for a share in the profits of an enterprise is breached, it is not conclusive against recovery of profits, that they cannot be

As to new business, the principle in Webster v. Bean, *supra,* seems supported also by the following cases: Kenny v. Collier, 79 Ga. 743, 8 S. E. 58; Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 49 C. C. A. 244; Paola Gas Co. v. Paola Glass Co., 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598.

A case under the rule of past profits being the basis for recovery of lost profits is well illustrated in Pipolo v. Ley & Co., 216 Mass. 246, 103 N. E. 475, where a corporation made an agreement with a woman giving her the exclusive privilege of supplying to workmen cooking their own meals the furnishing of provisions during certain work being done. The corporation failing to keep its contract, it was said: "The effect upon plaintiff's business, which had been established on defendant's promise, was disastrous. Her patronage gradually diminished until from the reduced number of men, the expense of maintenance exceeded profits." It was said the damages for loss of future profits were supported by substantial evidence.

This was based on Nelson Theatre Co. v. Nelson, 216 Mass. 30, 103 N. E.—which allowed the lessee of a theater wrongfully expelled therefrom by lessor to recover for loss of profits, it being shown what were his gross receipts and net profits by plaintiff of the prior year and it being shown by persons of large experience, that these would have continued as before.

But evidence of past profits is not conclusive, but only advisory to the jury. Bagley v. Smith, 10 N. Y. 489, 498; Maguire v. Kiesel, 86 Conn. 453, 461, 85 Atl. 689. C.

ITEMS OF PROFESSIONAL INTEREST.

GEORGE WHITELOCK—THE EFFICIENT SECRETARY OF THE AMERICAN BAR ASSOCIATION.

Readers who have become interested in our short biographical sketches concerning the leaders of professional movements in this country, have no doubt been expecting a reference to the professional work of the general secretary of the American Bar Association, Mr. George Whitelock, of Baltimore, whose portrait appears on our front cover page.

Born in 1854 in the city of Baltimore, and

litigated and office work. His activities in behalf of his profession have extended over many years. He has served successively as treasurer and as president of the Maryland State Bar Association; as a member from the United States in the International Law Association (for which he has prepared a number of formal papers); and since 1909 as secretary of the American Bar Association.

Mr. Whitelock has since 1908 represented his state on the Commission on Uniform State Laws, in which service he has participated in preparing and securing the enactment of the various Uniform Acts recommended by this Commission. So successful have been the efforts of Mr. Whitelock and his fellow commissioners from Maryland that all the Uniform Commercial Acts approved by the Commission (except the Partnership Act, recommended in 1914) have not only been placed on the statute books of their own state, but Maryland has the distinction of having given to the work of the Commission a "broader approval" than any other state except Massachusetts.

Mr. Whitelock also served as a member of the Committee on Revision of the Federal Equity Rules, appointed by the Circuit Court of Appeals of the Fourth Circuit, by request of the Supreme Court, and a few years ago was appointed by the governor of Maryland one of a commission to frame a Workmen's Compensation Act for that state.

As a member of the Maritime Law Association, as well as of the American Bar Association, Mr. Whitelock has taken much interest in the efforts of the two associations to correct the defects in the present federal law respecting damages for death by negligence at sea. The Titanic disaster brought the subject prominently before the people of this country, and Mr. Whitelock and those interested with him in the reform of the law on this subject secured the passage of the Peters' Bill by the last House of Representatives, giving a right of action to the personal representatives of one losing his life by reason of some wrongful act, neglect or default at sea or on the Great Lakes or on navigable waters of the United States. This bill failed to reach a vote in the Senate and this im-

"Six years ago I sought to demonstrate the need of a remedial statute by Congress to assimilate the law of the United States to that of Europe in respect of the right of dependents to recover damages for death of a relative by negligence at sea. It is not expedient to repeat my reasons here.

"Since my original address was delivered at Buda-Pesth, the Maritime Law Association of the United States and the American Bar Association have continued their earnest advocacy of the proposed reform, the arguments for which have been so tragically reinforced by the case of the Titanic. The American Congress seems at last aroused; and it is believed that the Peters Bill, introduced on June 17, 1913, in the House of Representatives, and favorably reported with amendments from the Judiciary Committee on December 22, 1913, will be duly enacted as the law of the American Courts of Admiralty. It is entitled, 'A Bill Relating to the Maintenance of Actions for Death on the High Seas and other Navigable Waters.' (6.)

"But it is obvious, I think, that neither the foreign law nor an American statute can do adequate justice in American courts so long as the standard established by the Act of 1851, furnishes the limit of a shipowner's liability. The subject of the limitation thereof has been considered in international conference and the draft of an international convention has been already distributed. That draft looks to international unification of the rules relating to the limitation of shipowners' liability in the case of sea-going vessels; the only method by which justice can be rendered both exact and uniform. In this reform, too, the Maritime Law Association of the United States is actively interesting itself. An able committee was appointed at its last meeting in New York on May 1, 1914, to consider the general subject of limitation of the liability of shipowners with special reference to the proposed draft convention and to report thereon to the association. This great and salutary reform is at least in posse."

BOOKS RECEIVED

The Law of Arrest in Civil and Criminal Actions. By Harvey Cortlandt Voorhees, of the Boston bar. Second edition. Price, $3.00. Boston. Little, Brown & Co. 1915. Review will follow.

HUMOR OF THE LAW.

Counsel—"May it please your Worship, I brought this man from jail on a habeas corpus."

Spectator (at the back)—"There's a bloomin' whopper for yer! Why, I m'self seed the pore fellow come in a taxi."—Law Student's Helper.

The other day there was a ten-year-old black boy before Judge William Greer, of Macon, Mo., charged with stealing railroad brass. He had been in numerous scrapes before for petty thieving. The kind-hearted judge didn't like to send such a little chap to jail, and yet he felt society demanded some protection from his pernicious activity. So he adjusted the judicial specs and began to dig into a large yellow book. In the rear of the court room was a big black woman, with a red handkerchief about her shiny brow. Noticing the learned judge's perplexity she got up and waddled forward.

"'scuse me, honerable jedge," she said, "fer buttin' in, but if yo'll lemme I kin give yo' some advice about dis case."

The judge looked up with a frown.

"Who are you?" he sternly demanded. "And what have you got to do with this case?"

"Not a thing—not a thing on earth," she hastened to explain. "I'm dat kid's mudder—dat's all."

"Ah!"

The judge closed his book with a bang, and took off his specs.

"And what would you advise?" he asked.

"Strap oil, an' if yo'll git the rawhide I'll 'ply it right in dis heah co't."

The judicial features relaxed. There was nothing between the covers of his book that fit the case so well. He looked over at the attorney for the railroad, who smiled and nodded assent.

"Mr. Constable," directed the judge; "here's a quarter; run and get me a whip."

The instrument of punishment was brought in. The mother took it, grabbed her wayward son and threw him across her knees. For fully ten minutes there was more noise in Judge Greer's normally solemn court than a steam calliope in good health could have made. Lawyers and spectators crowded close to see the show. The mother applied the remedy remorselessly, and at last the constable had to take the whip from her to prevent murder.

"Madame,——"

"My name's Malinda Johnston Washington, jege," panted the executioner.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Adultery**—Evidence.—In a prosecution for adultery with defendant's wife's niece, evidence that she had gone from his home to a home for fallen girls and there given birth to a baby is admissible to show intercourse between her and some man.—Bodkins v. State., Tex., 172 S. W. 216.

2. **Adverse Possession**—Acquirement of Title.—Title by adverse possession cannot be acquired by a municipality holding property in a governmental capacity for public purposes, under statute of limitations.—Gustaveson v. Dwyer, Wash., 145 Pac. 458.

3.——Color of Title.—A void deed under which the grantee therein claims possession is sufficient to show the nature and extent of his possession, and limitations run from the date of his entry into possession.—Big Sandy Co. v. Ramey, Ky., 172 S. W. 508.

4. **Assignments**—Coupled with Interest.—An equitable assignment by transfer to claimant of an account for goods sold, as security for a loan to the transferror, held to vest claimant with a power coupled with an interest in the account assigned, which was irrevocable.—Curtis v. Walpole Tire & Rubber Co., U. S. C. C. A., 218 Fed. 145.

5. **Asylums**—Release of Patient.—Superin-

date, unless at that time both parties agreed to the later date.—Davis v. Pioneer Life Ins. Co. of America, Mo., 172 S. W. 67.

7. **Bail**—Scire Facias.—Where the principal on a bail bond was not served with scire facias, failure to dismiss as to him before rendering judgment against the surety, who was served, did not invalidate the judgment.—State v. Lacker, Mo., 172 S. W. 369.

8. **Bankruptcy** — Exemption. — In view of Bankr. Act, §§ 67e, 70a, section 67f does not invalididate a contract lien on exempt property, whether the state laws specifically exempt the property or allow the bankrupt to select property to a specified value.—Bank of Mendon v. Mell, Mo., 172 S. W. 484.

9. **Banks and Banking**—Reception of Deposits.—A person having the control of a bank within the statute forbidding the receiving of deposits knowing the bank to be insolvent must know the condition of the assets, so far as possible by the exercise of diligence.—Gass v. State, Tenn., 172 S. W. 305.

10.——Sales of Stock.—A stockholder of a bank selling his stock to the president individually, who used the funds of the bank and gave the stockholder credit on the books of the bank, held not liable to bank creditors.—Green v. Ashe, Tenn., 172 S. W. 293.

11. **Brokers**—Pleadings.—A petition in a broker's action, which alleges employment to procure a purchaser for a specified price and the procuring of a customer to whom the owner sold for a less price to deprive the broker of compensation, justifies a recovery of reasonable compensation.—Martin v. Jeffries, Tex., 172 S. W. 148.

12. **Burglary**—Burden of Proof.—In a trial for housebreaking, the jury must believe that defendant took, stole, and carried away some of the articles designated.—Wallace v. Commonwealth, Ky., 172 S. W. 118.

13. **Carriers of Goods**—Delay.—Delay of a shipment which the consignee notified the consignor would not be accepted is not for that reason excused.—Ideal Leather Goods Co. v. Eastern S. S. Corporation, Mass., 107 N. E. 525.

14. **Carriers of Live Stock**—Contributory Negligence.—A shipper of cattle held not guilty of contributory negligence in failing to take them from the railroad pens and drive them to a watering place, where the train was late.—San Antonio, U. & G. Ry. Co. v. Storey, Tex., 172 S. W. 188.

15. **Carriers of Passengers**—Burden of Proof.—Where a passenger is injured as a result of the wrecking of the car in which he is riding, the burden is on the carrier to show that the utmost skill and foresight could not have prevented the accident.—Louisville & N. R. Co. v. Mitchell, Ky., 172 S. W. 527.

16.——Discrimination.—The one-cent militia fare law (Rev. St. 1909, § 8396) is not in violation of Const. art. 12, § 23, forbidding discrimination between or in favor of transportation companies and individuals.—State v. Missouri, K. & T. Ry. Co., Mo., 172 S. W. 35.

17.——Punitive Damages.—Where a woman gave the conductor her ticket, and he made her pay a second time, threatened to put her off the amounted to a conversion.—Boam v. Cohen, Kan., 145 Pac. 559.

20. **Commerce**—Federal Employers' Liability Act.—A laborer on the trestle used by a railroad for interstate commerce, held an employe engaged in interstate commerce, within the Federal Employers' Liability Act, when walking along the tracks to boarding cars.—Louisville & Nashville Railway Co. v. Walker's Adm'r., Ky., 172 S. W. 517.

21.——Franchise Taxes.—Rev. St. Tex. 1911, arts. 3837, 7394, attempting to impose on foreign corporations franchise taxes for the right to do business in Texas, consisting of a percentage of capital and surplus, whether within or without the state, held unconstitutional.—Crane Co. v. Looney, U. S. D. C., 218 Fed. 260.

22. **Constitutional Law**—Practice.—The court will not refuse to consider the constitutionality of a statute merely because it is old, and numerous property rights may have been based on it; it not appearing it has ever been before the court or acted on in any way.—McCamey v. Cummings, Tenn., 172 S. W. 311.

23. **Contempt**—Injunction.—One acquiring the property of a plaintiff who had obtained a judgment establishing water rights with a perpetual injunction may initiate contempt proceedings for a violation of the injunction.—Gale v. Tuolumne County Water Co., Ca., 145 Pac. 532.

24. **Contracts**—Demurrer.—A petition, in an action for compensation for plans for fixtures for a building, alleging that defendant accepted the plans as satisfactory, states a cause of action as against a demurrer, though the plans should be to the satisfaction of defendant.—Scarbrough v. Wheeler, Tex., 172 S. W. 196.

25.——Evidence.—Where defendant contracted to pay $25,000 if a fuse plant was found after a year to be worth $175,000 according to a certain test, defendant having made the test impossible by selling the plant, plaintiff could prove its value by other means.—E. I. Du Pont de Nemours Powder Co. v. Schlottman, U. S. C. C. A., 218 Fed. 353.

26.——Rescission.—A party having the right to rescind a contract by reason of the breach by the other party must exercise such right with reasonable promptness, and, if with knowledge of the fact he continues to accept payments due under the contract, the right to rescind is barred.—In re Warner's Estate, Cal., 145 Pac. 504.

27.——Setting Aside.—That one party drew up the contract with a certain stipulation, and that the adverse party did not know that it was inserted, does not justify the setting aside of the contract.—Parker v. Schrimsher, Tex., 172 S. W. 165.

28. **Corporations**—Privilege Tax.—A state may impose on particular classes of foreign corporations a franchise or privilege tax as a condition to their right to do business within the state.—Crane Co. v. Looney, U. S. D. C., 218 Fed. 260.

29.——Stockholder Liability.—A stockholder selling his stock to the president of the corporation, who used the funds of the corporation to pay therefore, and who sold the stock the next day at the same price, held not liable to creditors on the insolvency of the corporation.—Green v. Ashe, Tenn., 172 S. W. 293.

30. **Courts**—Jurisdiction.—A federal court of equity held to have jurisdiction to determine the validity of an asignment of an interest in a distributive share of an estate, and to make such decree as would establish the rights of the assignee, which might be recognized and enforced by the probate court.—Gatzert v. Lucey, U. S.

clerk and affirmed, as perfected by the polling of the jury.—State v. Hightower, La., 67 So. 13.

33. **Damages**—Deduction.—Where an injured servant exercised reasonable care in selecting a surgeon, defendant was not entitled to deduction from damages sustained by reason of any unskillfulness of the surgeon.—Suelzer v. Carpenter, Ind., 107 N. E. 467.

34.——Instructions.—An instruction, in an action for injury causing loss of an eye, which directs the jury to assess damages in the sum which will compensate plaintiff for the loss, does not authorize a recovery for loss of earnings, and a party desiring an instruction thereon must request it.—Jorkiewicz v. American Brake Co., Mo., 172 S. W. 441.

35.——Measure of.—Where plaintiff failed to secure a contract for personal services because of defendant's default, plaintiff's measure of damages was the amount he would have received, less the cost of performing the contract and what he obtained in other employment during the term.—Hicks v. National Surety Co., Mo., 172 S. W. 489.

36. **Deeds**—Beneficial Title.—Where a voluntary conveyance was not intended to convey the beneficial title to the grantee, who for some time had no knowledge of the deed, the beneficial title remained in the grantor as between the parties.—Cooper v. Newell, Mo., 172 S. W. 326.

37.——Delivery.—To constitute a delivery of a deed a manual tradition of the instrument is not sufficient unless accompanied by the intent of presently transferring title and unhampered by the reservation of a right of revocation or recall.—Bais v. Reed, Cal., 145 Pac. 516.

38. **Descent and Distribution** — Universal Legatee.—A succession is acquired by an instituted heir or universal legatee by operation of law at the instant of testator's death, without any legal proceedings or taking of possession.—Succession of Reilly, La., 67 So. 27.

39. **Disorderly Conduct**—Defense.—One cannot defeat a prosecution of the offense of using insulting language to provoke an assault punishable by Ky. St. § 1271, by showing that the person to whom the language was used was at the same time guilty of the offense.—Bruce v. Scully, Ky. 172 S. W. 530.

40. **Drains**—Public Policy.—It would be against public policy to permit the destruction of a drainage district corporation merely because those who were active in its creation made improvident statements as to cost and location.—Carder v. Fabius River Drainage Dist. No. 3, Mo., 172 S. W. 13.

41. **Electricity**—Instructions.—Where petition contained general allegation of negligence, and also alleged specifically that insulation of electric light wire was worn, instruction held erroneous, as applying the doctrine of res ipsa loquitur, and not requiring a finding of the specific acts of negligence alleged.—May v. City of Hannibal, Mo., 172 S. W. 471.

42.——Respondeat Superior.—A railway company held not liable for the death of a telephone lineman by coming in contact with a guy wire on a telephone pole charged with electricity from a feed wire of the railway company, where the guy wire was put up by the telephone company.—Magee v. New York Telephone Co., N. Y., 107 N. E. 493.

43. **Eminent Domain**—Public Service Corporation.—Public service corporations having power of eminent domain may determine the location of their works for which land is sought to be condemned.—State v. Superior Court of Thurston County, Wash., 145 Pac. 421.

46. **Extradition**—Requisition.—The Governor of an asylumn state, on whom requisition is made for the surrender of an alleged fugitive from justice, is not required to hear the prisoner before ordering his removal.—Ex parte Chung Kin Tow, U. S. D. C., 218 Fed. 185.

47. **Forcible Entry and Detainer**—Action.—A city removing, from a public wharf, lumber obstructing it, after giving notice to the owner to remove it, does not use force and violence, within the forcible entry and detainer statute.—Hafner Mfg. Co. v. City of St. Louis, Mo., 172 S. W. 28.

48.——Intimidation.—A forcible entry of lands means more than a mere trespass, and does not exist in the absence of actual violence or a show of force reasonably calculated to intimidate the rightful owners.—Hammond Savings & Trust Co. v. Boney, Ind., 107 N. E. 480.

49. **Fraud**—Fiduciary Relation.—The relationship alone of sister and brother does not create a fiduciary relation, and the sister, who is an adult, may purchase the interest of the infant brother at a sale ordered by the court.—Westergreen v. Beer, Cal., 145 Pac. 543.

50. **Fraudulent Conveyances**—Separate property.—Though some of the property conveyed by a debtor was his wife's separate property, held, that a creditor might attack the conveyance as to property belonging to the debtor.—Citizens' State Bank v. McShan, Tex., 172 S. W. 565.

51. **Guardian and Ward**—Jurisdiction of Courts.—Courts are the overguardians of all infants whose estates are intrusted to them, and mere technicalities will not warrant the court in upholding the sale of the ward's property resulting in wrong and injustice to the ward.—Gillispie v. Darroch, Ind., 107 N. E. 475.

52. **Homicide**—Self Defense.—Where accused is justified on the ground of self-defense depends on whether he believed, on reasonable grounds, that it was necessary to kill deceased to avert the real or apparent danger to himself.—Weathers v. Commonwealth, Ky., 172 S. W. 107.

53. **Husband and Wife**—Joint Occupancy.—Where land conveyed by a husband to his wife was occupied by both parties as their home before and after the conveyance, the joint occupancy could not furnish a basis for a claim of prescriptive title by one against the other.—Bais v. Reed, Cal., 145 Pac. 516.

54.——Use and Occupation.—Where a legatee and her husband held over after the termination of her estate, she alone was liable for use and occupation, a claim for which was available as a set-off against her share of the proceeds on a sale of the land.—Oliver v. Epperson, Mo., 172 S. W. 424.

55. **Indictment and Information**—Grand Jury.—Where an indictment was submitted to the grand jury, by order of court, based on a presentment of the grand jury, it was not objectionable, because not based on an accusation made before a committing magistrate or commissioner, supported by oath or affirmation.—United States v. Wetmore, U. S. D. C., 218 Fed. 227.

56.——Joinder.—The offense of false swearing is not an offense in which two or more persons may participate, and hence the joinder of two defendants in an indictment for false swearing was unauthorized.—Walker v. Commonwealth, Ky., 172 S. W. 109.

57. **Injunction**—Practice.—In a suit to recover the loss occasioned by a contractor because defendant, a labor union, lowered the rate of wages without notifying the contractor, a demurrer will not lie to the prayer to enjoin the union's withdrawing certain funds in the bank, since the proper remedy is motion to dissolve.—Powers v. Journeymen Bricklayers' Union No. 3, Tenn., 172 S. W. 284.

58. **Innkeeper**—Ordinary Care — An inn-

under an agreement that the niece should pay the premiums and collect the proceeds held void.—Equitable Life Assur. Society v. O'Connor's Adm'r, Ky., 172 S. W. 496.

60.——Insane Person.—An offer of an insurance company to issue new policies to policy holders of an insolvent company held limited to such holders personally, and could not be accepted for an insane policy holder by his guardian.—Robinson v. Postal Life Ins. Co., U. S. C. C. A., 218 Fed. 347.

61.——Lex Loci Contractus.—Provisions of certificate limiting time to sue held governed by laws of state where member resided and local lodge of which he was a member was situated when the certificate was issued.—Simmons v. Modern Woodmen of America, Mo., 172 S. W. 492.

62. **Intoxicating Liquors**—"Blind Tiger."—The definition of a "blind tiger" in Acts 1914, No. 146, is controlled by the phrase "in connection with any business conducted in such place," whether the liquor is kept for sale or to be given away.—State v. Mackie, La., 67 So. 25.

63.——Prohibition.—Prohibition did not go in force, in the precinct in which an election had been held, until publication of the order was made by the judge.—Rhodes v. State, Tex., 172 S. W. 252.

64. **Judicial Sales**—Jurisdiction.—Where the chancellor permitted the purchase money to be collected on condition that a refunding be given, he had jurisdiction on failure of title to recall such money.—Galloway-Pease Co. v. Sabin, Tenn., 172 S. W. 292.

65. **Landlord and Tenant**—Description. — A lease of premises, described as a strip out of a designated survey lying west of and adjoining a survey named containing 115 acres, does not describe the land.—Ratliff v. Wakefield Iron & Coal Land Improvement Co., Tex., 172 S. W. 198.

66.——Estoppel.—Where a lessor fraudulently misrepresented the character of the land, the lessee, who relied upon his statements, is not estopped to rescind because the lease recited that he had inspected the land and was satisfied with it.—Robey v. Craig, Tex., 172 S. W. 203.

67.——Eviction.—The measure of damages to a tenant on shares, resulting from his eviction by the landlord, is the value of the crops he could probably have raised, less the expense of raising them and less his reasonable earnings after the eviction.—Bost v. McCrea, Tex., 172 S. W. 561.

68.——Trespass.—The remedy of a renter of a room from the tenant of the house, against an agent of the owner who forcibly removed his property therefrom, is by ordinary trespass, not forcible entry and detainer, under Rev. St. 1909, § 7656.—Strauel v. Lubeley, Mo., 172 S. W. 434.

69. **Lis Pendens**—Notice.—Where fraud was alleged in the sale of the land of a ward, subsequent purchasers, buying long after lis pendens notice had been properly filed and made of record, were in no better position than their vendor.—Gillispie v. Darroch, Ind., 107 N. E. 475.

70. **Malicious Prosecution** — Compensatory Damages.—The elements of compensatory damages in an action for malicious prosecution include loss of time, peril to life and liberty, injury to fame, reputation, and health, mental suffering and decrease in earning power.—Black v. Canadian Pac. Ry., U. S. D. C., 218 Fed. 239.

71. **Mandamus**—Jurisdiction.—Where the probate court determined from the law of the case that it had no jurisdiction to order a partial payment to a ward pending exceptions to final settlement, mandamus could compel it to take jurisdiction and determine the application on the merits.—State v. Shackelford, Mo., 172 S. W. 347.

72. **Marriage**—Common Law.—To constitute a

73. **Master and Servant**—Assumption of Risk.—Where employe suggested to employer's superintendent that the horse known to be vicious be placed in a box stall, but was told that if he was careful he would not be hurt, held that he did not assume the risk of injury from being kicked by the horse.—Moore v. American Express Co., Mo., 172 S. W. 416.

74.——Assumption of Risk.—Assumption of risk is confined to relation of master and servant, and a servant assumes the risks ordinarily incident to the work after the master has observed ordinary care in providing a reasonably safe place and appliances.—Fish v. Chicago, R. I. & P. Ry. Co., Mo., 172 S. W. 340.

75.——Assumption of Risk.—Unless the danger be obvious, the defenses of assumption of risk do not apply, where the injured employe was performing his work in the usual manner.—Collins v. Krause-Managan Lumber Co., La., 67 So. 12.

76.——Course of Employment.—Death of cook on a lighter from heart disease, aggravated by his exertions in saving his effects from the sinking lighter, held an "injury arising out of and in the course of employment," within Workmen's Compensation Act.—In re Brightman, Mass., 107 N. E. 527.

77.——Hours of Service Act.—Where government showed that railway firemen were on duty more than 16 consecutive hours, defendant held to have burden of proving facts defeating liability, within the proviso of Hours of Service Act, § 3.—Great Northern Ry. Co. v. United States, U. S. C. C. A., 218 Fed. 302.

78.——Jury Question.—Where an employe, on suit for breach of his contract, claimed that outside earnings should not be deducted from defendant's liability, whether such work was inconsistent with his obligation under the contract held for the jury.—Breakwater Co. v. Donovan, U. S. D. C., 218 Fed. 340.

79.——Licensee.—A railroad employe walking along the tracks from work to the boarding cars where he lived, held in the employ of the company and entitled to protection as such.—Louisville & N. R. Co. v. Walker's Adm'r, Ky., 172 S. W. 517.

80.——Ordinary Employment.—When a servant is taken by the master from his ordinary employment and put at work that he never before has done, there rests upon the master the duty of instructing the servant with respect to the methods and the dangers of the new kind of work, and such duty is an absolute one, for the performance of which the master is personally responsible.—Freedom Casket Co. v. McManus, U. S. C. C. A., 218 Fed. 323.

81.——Proximate Cause.—Where by contractor's failure to lay a floor on the second story of a building, as required by Acts 1911, c. 236, § 2, plaintiff fell from the third to the first story, the violation of a statute sufficiently appeared to have been the proximate cause of injury.—Suelzer v. Carpenter, Ind., 107 N. E. 467.

82. **Mines and Minerals**—Presumption of Law.—Where a patent has been issued for a mining claim, there is a conclusive presumption that there is a discovery vein therein, that the claim was properly located thereon, and that all precedent acts necessary to authorize the issuance of the patent had been performed.—Stewart Mining Co. v. Bourne, U. S. C. C. A., 218 Fed. 327.

83. **Mortgages**—Ratification.—Where a deed requiring the grantee to pay a mortgage was executed and recorded without his knowledge, the mortgagee cannot, the grantee not having ratified the conveyance, recover against him personally.—Llewellyn v. Butler, Mo., 172 S. W. 413.

84. **Municipal Corporations**—Abuse of Discretion.—Where a city exercises its police power, the means appropriate to the exercise rest in the discretion of the city, and courts will not interfere in the absence of a clear

of negligence.—West Const. Co. v. White, Tenn., 172 S. W. 301.

86.——Negligence.—One injured by a runaway horse may rest on a prima facie inference of negligence from it having been left unhitched on the street, though the question of negligence remains for the jury.—Rosenberg v. Dahl, Ky., 172 S. W. 113.

87.——Negligence.—Though plaintiff, attempting to cross a wire which city employes were winding on a reel, was negligent, yet, if such employes, knowing of his danger, could have avoided injury, but failed to do so, their negligence was the proximate cause, rendering the city liable.—Gladen v. City of Seattle, Wash., 145 Pac. 418.

88.——Negligence per se.—A pedestrian, who in the daylight, with knowledge of the rounded condition of a curb, elected to walk thereon to avoid the mud, when by taking a few steps to either side she could have avoided both, held negligent as a matter of law.—Werthner v. Girard Ave. Farmers' Market Co., U. S. C. C. A., 218 Fed. 364.

89. **Negligence**—Presumption.—In the absence of proof of negligence, the legal presumption that the injury complained of was not due to any fault of defendant arises where the doctrine of res ipsa loquitur is inapplicable.—Tawney v. United Rys. Co. of St. Louis, Mo., 172 S. W. 8.

90. **Nuisance**—Right of Way.—The placing by a railroad company of bunk cars, for the use of its laborers, upon its right of way adjacent to plaintiff's property, does not of itself create a nuisance.—Excelsior Products Mfg. Co. v. Kansas City Southern Ry. Co., Mo., 172 S. W. 359.

91. **Railroads**—Last Clear Chance.—A recovery under the last clear chance doctrine for death at a railroad crossing can only be based on proof that decedent was in a position of danger for a sufficient length of time to have enabled the engineer to have prevented the accident.—Whitesides v. Chicago, B. & Q. R. Co., Mo., 172 S. W. 467.

92.——Licensee.—A person crossing an interurban track from a station to a platform to take an approaching car is not required to exercise the same care for his safety as a trespasser or person at a highway crossing.—Meierhoff v. United Rys. Co. of St. Louis, Mo., 172 S. W. 402.

93.——Proximate Cause.—Though river overflowed plaintiff's land, if railroad company by altering drains caused a greater overflow, which, with the water from the river, caused damage, railroad company held liable.—Chicago, R. I. & P. Ry. Co. v. Hankins, Ark., 172 S. W. 255.

94.——Variance.—In an action for the death of a pedestrian at a crossing, proof that deceased was crossing in one direction is not a material variance from an allegation that he was crossing in the opposite direction.—Texas & P. Ry. Co. v. Marrujo, Tex., 172 S. W. 588.

95.——Warning.—A railroad company, independent of statute or ordinance, is bound to give timely warning of the approach of trains at a town crossing.—Pittsburgh, C. C. & St. L. Ry. Co. v. Macy, Ind., 107 N. E. 486.

96. **Sales**—Notice.—Where one signing an order for merchandise to be furnished by another notified the latter before acceptance not to ship the goods, there was no enforceable contract.—Outcalt Advertising Co. v. Wilson, Mo., 172 S. W. 394.

97. **Schools and School Districts**—Action by.—A board of school directors has no authority to sue for property donated to a private academy for school purposes and sold by the trustees of the academy after the expiration of its charter.—Board of Directors of Public Schools of Caldwell Parish v. Louisiana Central Lumber Co., La., 67 So. 23.

court.—Great Northern Ry. Co. v. United States, U. S. C. C. A., 218 Fed. 302.

99. **Sunday**—Verdict on.—Where adjourned term was convened upon adjournment of regular term on Saturday, and case was then placed on trial, held that there was no objection to the return of a verdict on Sunday; it being within the term.—Town of Athens v. Miller, Ala., 66 So. 702.

100. **Taxation**—Suit on Bond.—Where a deputy tax collector negligently failed to collect taxes, the tax collector, in an action on the deputy's bond, cannot recover the amount of the taxes not collected, but only the amount which he was damaged by his deputy's failure. Stearns v. Edmonds, Ala., 66 So. 714.

101. **Telegraphs and Telephones**—Incorrect Address.—If the specific address on a message, when given a telegraph company to transmit, is an impossible or incorrect one, the company is not liable for delay in delivery proximately caused thereby.—Western Union Telegraph Co. v. Smith, Ala., 66 So. 578.

102. **Trade-Marks and Trade-Names**—Expiration of Patent.—Where the Whitneys, manufacturing a car wheel under the Faught patent, sold it as such, the public did not, on expiration of the patent, acquire right to use the name "Whitney" in such manufacture.—Sanford-Day Iron Works v. Enterprise Foundry & Machine Works, Tenn., 172 S. W. 537.

103. **Trade Unions**—Contract.—A labor union organized to regulate the wages of its members and protect them in their contracts and the promotion of their interests as laboring people is lawful.—Powers v. Journeymen Bricklayers' Union, No. 3, Tenn., 172 S. W. 284.

104. **Trespass to Try Title**—Confession and Avoidance.—A defendant in trespass to try title may, under pleas of the general denial, not guilty, and a special defense, prove any fact in rebuttal of plaintiff's testimony, but cannot introduce evidence in confession and avoidance, except as pleaded.—Parker v. Schrimsher, Tex., 172 S. W. 165.

105. **Trial**—Findings.—Where, on an issue of estoppel against the widow to allege a breach of an antenuptial contract by her husband since deceased, the court made a general finding that she was estopped, which was sustained by the evidence, the court did not err in failing to expressly find that her failure to exercise her right to rescind during the husband's lifetime was not caused by his undue influence.—In re Warner's Estate, Cal., 145 Pac. 504.

106. **Trover and Conversion**—Measure of Damages.—The measure of damages is ordinarily the value of the property at the time of the conversion with interest, but, if the evidence shows fluctuation in value, the jury may fix the highest price between the conversion and the time of trial.—Jones v. White, Ala., 66 So. 605.

107. **Trusts**—Bonus.—Under pamphlet issued by real estate promoter and contracts with purchasers, donation of bonus to first railroad through the land, held absolute, regardless of any agreement between him and trustees of the fund.—West Texas Bank & Trust Co. v. Matlock, Tex., 172 S. W. 162.

108.——Evidence.—Evidence of declarations of the grantor introduced to show a parol trust held admissible, though the witness could not give the exact language or exact date.—Hambleton v. Southwest Texas Baptist Hospital, Tex., 172 S. W. 574.

109.——False Representation.—Where an agent fraudulently took title to the premises in the name of his infant son and there-

111.——Statute of Frauds.—Where a party to an oral trust induced the trustee to convey the entire property to her in fraud of the other beneficiaries, the statute of frauds cannot be asserted as a bar.—Reardon v. Reardon, Mass., 107 N. E. 522.

112. **United States**—Surety on Bond.—Surety on bond of contractor for public building, held liable for damages sustained through contractor's default, though the government entered into an entirely new contract with a third person for different work.—United States v. United States Fidelity & Guaranty Co., 35 Sup. Ct. Rep. 298.

113. **Vendor and Purchaser**—Option.—The phrase "at any time during the life of this option," in a contract to convey land, means during the time in which the contract of sale was to be consummated by a conveyance for a stated price.—Charbonier v. Arbona, Fla., 67 So. 41.

114.——Rebuttable Presumption.—Knowledge of vendor and purchaser that the lien of a purchase-money note could not be removed might well raise the presumption that it was not contemplated that it should be removed, rebuttable, however, by proof to the contrary.—Riggins v. Post, Tex., 172 S. W. 210.

115.——Rescission.—Where defendant asked to have his contract of purchase rescinded for fraud by plaintiff's agent and for damages, judgment for defendant reversed, with directions to enter judgment for the plaintiff.—Connecticut Mut. Life Ins. Co. v. Guseman, Mo., 172 S. W. 396.

116. **Waters and Water Courses**—Confiscatory Rates.—That the owner of a water system did not produce any evidence as to the value of the property before a state commission, which subsequently made an order fixing rates to be charged to customers of such system, does not estop him to deny the fairness of the valuation made by the commission, or to claim that the rates made are confiscatory.—Van Dyke v. Geary, U. S. D. C., 218 Fed. 111.

117.——Railroad Bridge.—A railway company which places a bridge across an unnavigable stream must provide for the undisturbed passage of all water reasonably to be anticipated. —State v. Minneapolis, St. P. & S. S. M. Ry. Co., N. D., 150 N. W. 463.

118. **Wills**—Construction.—Where an estate is given to one generally or indefinitely, with power of devise, the gift carries the entire estate, and the devisee or legatee takes, not a simple power, but the property absolutely.—Brandau v. McCurley, Md., 92 Atl. 540.

119.——Construction.—Relative to whether testator's daughter took a fee, or only a life estate, with remainder to her children, a subsequent clause giving a valuation of her land and advancement sheds no light.—Burns v. Moseley, Ky., 172 S. W. 521.

120.——Undue Influence.—Persuasion whereby testator was induced to make his will differently from the way he would otherwise have made it, where not overriding the will of testator, does not amount to undue influence.—Posy v. Donaldson, Ala., 66 So. 662.

121. **Witnesses**—Cross-Examination.—A witness having identified a smooth quarter found in defendant's possession, as an incriminating circumstance, the court did not err in limiting the cross-examination to the means by which he assumed to distinguish the coin from any other like coin.—People v. Warner, Cal., 145 Pac. 545.

122.——Impeachment.—Proof that prosecutrix, [illegible] deceased, whose testimony given at the

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THE RULE IN ELECTRICITY CASES AS TO SAFETY APPLIANCES.

A very interesting statement is made in an opinion by Springfield (Mo.) Court of Appeals in Melcher v. Freehold Inv. Co., 174 S. W. 455, regarding the obligation of an employer to protect the operators of his electric elevators.

The court deduces from obligation of highest degree of care imposed on those who use electricity that the rule declared by the Supreme Court of that state, and many other courts, that in cases of ordinary care a master, not being an insurer, is only bound to use reasonable care and precaution to furnish his servants with safe appliances, but not the newest and best, is not controlling, where a subtle and dangerous thing like electricity is used.

In this case there was evidence that plaintiff was an elevator boy in an office building. On a stormy night he entered the elevator for the purpose of going up, and in taking hold of the lever to start it he received a shock, from which he suffered serious injury. It was shown also that there was a device called a "lightning arrester," which, had it been on this elevator, would have been an absolute protection against this injury, it being the very best precaution against lightning known to the electrical profession. It was not, however, ordinarily used on office buildings or on a motor installation. Plaintiff had a verdict and it was affirmed on appeal.

It was said by Court of Apeals that:

sary to measure the highest degree of care. The cases cited by appellant laying down the rule that a defendant cannot be held negligent, where the evidence shows that he conformed to the ordinary usages and methods employed by those engaged in the same line of business are all cases where such defendant was only to be held to the exercise of ordinary care and not to the utmost or highest degree of care. One reason for this is that, in exercising ordinary care to make a place reasonably safe, a master does not have to use the latest and most approved appliances, so long as the appliances are reasonably safe, and in determining whether he has exercised ordinary care in making the place reasonably safe, his conduct is to be measured by the conduct of those engaged in the same line of business. But where the law places on a person the duty of exercising the highest practicable degree of care he must employ every well-known device and exert every well-known precautionary measure to fulfill his duty. His conduct, therefore, is not measured by what someone else does, but by what he or someone else should do in the particular situation, in order to bring himself up to the standard that the law fixes and requires."

The court thought this rule was recognized in Coin v. Lounge Co., 222 Mo. 488, 506, 121 S. W. 1, 25 L. R. A. (N. S.) 1179, 17 Ann. Cas. 788, but all we find there is that the rule was not condemned, and the case is far from an explicit announcement of the rule. We think, however, the rule is a very salutary one and gives concrete application to an expression frequently used by many courts in speaking of the rule governing those who handle or put employes in a situation, where are handled, electrical currents so potent in sudden and

In an earlier Kentucky case the court spoke approvingly of a rule suggested in Thompson on Electricity, that corporations using electricity ought to be regarded as quasi-insurers, and said for itself that one was bound to use every protection accessible in behalf of his servants. Overall v. Electric L. Co., 20 Ky. L. R. 759, 47 S. W. 442.

In Mahan v. Street Railway, 189 Mass. 1, 75 N. E. 59, the evidence showed that plaintiff was injured by reason of failure of defendant to put up and maintain guard wires to prevent contact with other wires; that it was customary to use such guard wires, but they were not used in many important localities in the vicinity. The court said: "The defendant was operating cars in the public streets by the use of a highly dangerous agency. It was bound to know that other wires were or might be strung along the streets for various purposes and that persons would or might be employed to work upon them, and it was its duty in the exercise of reasonable care to adopt such precautions as were proper to prevent its own wires from coming in contact with the wires upon which such persons were or might be employed and injuring them."

Here there seems to be given little attention to the question of what other companies in the same line of business did.

In Crowe v. Nanticoke Light Company, 209 Pa. 580, 58 Atl. 1071, it was held error for the trial court to charge that an electric company was not bound to have "an equipment or plant containing the most modern and recent appliances, but only such as were in common and general use at that time for like purposes."

The expression of such a company being bound to the highest degree of care occurs very often, where there is no question of appliances and the duty to supply them, whether in customary use or not. We think the Missouri court and the other courts as

NOTES OF IMPORTANT DECISIONS

SALE—RESCISSION AS TO STOCK ON HONEST MISREPRESENTATION OF FACT AS TO CORPORATE PROPERTY.—The Supreme Court of Minnesota holds, in effect, that, if there is a purchase of a thing, say stock in a corporation, an honest misrepresentation by the seller of what its value is based upon offers ground for rescission in equity. Drake v. Fairmont Drain Tile Brick Co., 151 N. W. 914.

This as a principle of law may not well be disputed. See McGowan Co. v. Carlson, Wash., 139 Pac. 869; Grant v. Ledwidge, Ark., 160 S. W. 200. Especially if deceit is practiced.

But is there not some rule of caveat emptor as to the purchase of shares of stock honestly vended?

The facts in the Minnesota case supra shows that a corporation for the manufacture of vitrified drainage tiles was organized and its plant located on a tract of land supposed to have a clay deposit peculiarly adapted for such product. There were subscriptions for shares of stock and more than $100,000 was expended in construction of a factory. It turned out the clay was unsuitable and the corporation had to procure suitable clay from other places, some of it hauled a distance of 18 miles.

Officers of defendant before this unsuitability was ascertained sold some of its stock to plaintiff, representing as they honestly believed, that the clay was all that was expected. Upon the contrary proving true, plaintiff sued for rescission.

The case, as reported, is scant, seemingly, of necessary recital of facts. For example, if plaintiff was an early subscriber and saw a factory going up upon the belief of investors, would he be allowed to lay by and await proof of a statement of this character however honestly and in whatever terms it is made, unless it expressly guarantees the truth of the statement?

The court appeals to the principle that a contract made upon honest misapprehension of a fact, which is the basis of contract, shows there was no meeting of minds and therefore no contract. But this principle is to be applied with a grain of allowance. If the representation is shown to be honest and acted on by promissor as believed in, and is in relation to a fact depending on judgment, within this case, the proceeds of sale being expended in reliance on the truth of the statement, or, in other words, on defendant's judgment. As far as the particular case is concerned it seems to us there was error in reversing the lower court. It would seem there was considerable room for the inference of conclusive estoppel against plaintiff.

BENEFIT SOCIETIES—CHANGE IN BY-LAWS AS TO COMMISSION OF SUICIDE.—The Supreme Court of Minnesota holds, that extension of the period for decrease in amount of insurance from two to five years, where insured shall commit suicide, sane or insane, is binding on one who commits suicide while sane, where the contract provides that insured shall be bound by laws then in force or thereafter enacted, though such extension may not extend to one committing suicide when insane. Ledy v. Nat. Council K. and L. of Security, 151 N. W. 905.

The theory upon which this case goes is that while amendments of the laws of such an order are limited to details of management rather than to basic matters of conduct between it and members, yet suicide by one sane reasonably may be forbidden in the future.

The court deciding the principle contents itself greatly with the mere citation of authority. It said, however, that: "The reasons (for validity of amendment) are various. Attention is frequently called to the fact that, at common law, suicide was a crime which entailed forfeiture of property; that while the successful perpetrator is beyond the reach of the law, he commits an act which is malum in se and which the law tries to prevent by all the means in its power; that he has no moral, legal or other right to commit such an act; that the law cannot say that a provision which prevents him from fastening liability upon the association by his own criminal act voluntarily committed is unreasonable, and that such a provision not only invades no legal or vested right, but takes away a possible incentive to commit a heinous offense."

Such a clause as we cite appears to put suicide by one sane or insane on the same footing, and generally it might be thought, that if amendment cannot affect those already insured, so it should not affect those who commit suicide while sane. But the provision may be looked at as putting a limitation upon the right of recovery where a suicide is

INVASION OF THE INSURANCE FIELD BY THE STATE BY WORKMEN'S COMPENSATION LAWS.

Just now there is a considerable inclination in public opinion towards state insurance of compensation for industrial injuries, owing to dissatisfaction with the casualty insurance companies on account of their high rates (actual or proposed) in the states which have recently enacted elective compensation laws.

In what follows I will present what, in the writer's opinion, are the principal objections to state insurance of compensation.

In Europe and the Colonies of Great Britain there are four principal forms of the law of compensation for occupational injuries:

(1) The simple form of employers' direct liability for compensation—the form of Great Britain and its Colonies.

(2) Compulsory mutual insurance of compensation—the German and Austrian form.

(3) Compulsory state insurance of compensation—the monopolistic or Norwegian form.

(4) Compulsory insurance of compensation in various optional ways—the form of Italy, The Netherlands, etc.

Even if we believe—what is constantly appearing more doubtful—that the German system of compulsory mutual insurance is the best, yet we cannot adopt it, because it is fitted only to political, social and industrial conditions far different from ours. More particularly the trade associations, with power of regulation, etc., over the establishments of their members, are vital to the success of the German system. Without that feature the German system would result in the subsidization of careless employers at the expense of the careful—in short, in the promotion of accidents.

As between the Norwegian system of

hand, the tendency of opinion just now seems to be in favor of the Norwegian method. For if the state goes into the insurance business at all, it is simpler and cheaper for it to have a monopoly. Otherwise it will get the bad risks and the risks in those employments for which it may accidentally place its rates too low, and will then have to compete with private companies for the good business, and, of course, incur a higher cost of administration. The reason why the state cannot successfully compete with private companies is not far to seek; it is because it cannot conduct business as efficiently as can private enterprise. Its errors in rates are constant and flagrant. Its cost of administration is in some cases very low; but that is effected largely by omitting the expensive procedure requisite for right conduct and efficiency, so that the real cost to employers and to the public may eventually be very high. The state insurance office may secure the entire field to itself by operating at a loss; but if, to avoid that, it jacks up rates arbitrarily, private companies will underbid for the really good risks, and leave the state to carry the bad. We seldom hear well-informed advocates of state insurance boast of its success in Italy or the Netherlands. To thrive, state insurance must have a practical monopoly of the field in which it operates. Therefore, Norway is the model to follow, if we elect state insurance as our principal recourse.

The choice, therefore, narrows down until it lies between compulsory state insurance, as in Norway, and a simple compensation liability law, as in England—with provisions for compulsory security or insurance added, if deemed desirable.

There is one vital factor omitted in the calculations of the majority of the advocates of state insurance. Their object is merely to distribute the wage losses from industrial accidents. But that is not the These latter objects our advocates of state insurance generally ignore. It is the prevailing opinion of experts in industrial safety, that the imposition upon employers individually of the compensation liability for the accidents occuring in their respective establishments, is the most efficient single means of effecting a reduction in industrial accidents, and, therefore, that if the employer be required by law to insure the payment of that liability, the cost of his insurance should be very closely in proportion to what would be his direct liability were it not for the insurance. But if insurance enables an employer to shift the excess of his liabilities (over the average) upon his competitors, *the effect will be to encourage him to continue the use of dangerous processes, practices and equipment, obsolete machinery and cheap and unskilled labor, to increase the intensity of his labor and to relax his care and efforts for safety.*

It is perhaps possible that the state may be able, by statutory regulations, to compel all employers in each industry to maintain something approaching a common level of safety, so that a "flat" rate for each industry would correctly distribute the compensation cost. But such a level of safety could only be low; for state regulations are inevitably either merely elementary or too general, inelastic and *inexpert* to effect the high level of safety that could be reached if safety were to be made an economic advantage to the individual employer. Accidents are not so much in proportion to violations of state regulations as they are in proprotion to the risks inherent in the trade, to the care and conduct of the employer, to the character of his equipment (including personnel) and to the intensity of his "drive." It is simply folly to believe that the state by formal regulations can control these latter factors of danger as well as the employer can or as he would if given a direct pecuniary motive for so doing. Equally gerous establishments in particular industries, for the purpose of imposing an exceptionally high premium rate upon such establishments—for that supposes a common level of safety, with a few conspicuous exceptions, whereas in fact, the different establishments in each industry are more apt to run the gamut from the highest to the lowest level in the scale of safety conditions, so that if the rate of insurance is varied for one it should, in fairness, be varied for many or all.

The first objection to state insurance, therefore, is that it would result generally in an arbitrary flat rate in each trade, which, while it might distribute cost of compensating for accidents, would not distribute it *justly* nor so as to offer a pecuniary inducement to the individual employer to exert the utmost thought and care and to go to the extreme of his ability in expense in order to reduce the proportion of accidents in his own establishment. This objection to state insurance is illustrated by a comparison between the premium rates in England, under simple compensation, and the rates in Norway under state insurance. In England, the rate for each trade, being subject to competition, is elastic, and varies approximately in proportion to the estimated risk in each establishment. In Norway, the rate for each industry is "flat;" and experience shows that in the past the rates for the respective industries have generally been either about double, or about one-half the estimated cost of the compensation liability accrued; in other words, not only have the safer establishments paid part of the losses in the less safe establishments in the same trade, but many trades have paid part of the losses in other trades. Perhaps the rates may be adjusted until in time they whole subject employers will be reduced to the condition of mere wards of the state, so that each will have to take whatever rate the state may give him and will feel called upon to take only the precautions against accidents that the state may require. That is far from being the most effective way to prevent accidents. But it is a most effective first step on the way to *complete state control and operation of industries.*

There is only one working example of compulsory state insurance of compensation—the Norwegian system. Except as to justice and the prevention of accidents, which that system ignores—in other words, as a pure insurance proposition—the experience under the Norwegian system has so far been quite favorable, (i. e., so far as known, for Norwegian experience is to a large degree hidden from us by difficulties of language). To what extent that favorable experience has been due to the extremely favorable conditions in Norway, is a question. The experiment has been on a small scale, for the population of Norway is only about 2,200,000, of whom only a relatively small proportion are engaged in industries covered by insurance; the population is stable, which is an important factor in cheapness and correctness of administration, and the vital dangers of the scheme have not yet been fairly tested, because it had been only a few years in operation and so far has happened to be under the charge of unusually competent insurance experts, and singularly free from politics. But even under such conditions, the insurance rates in Norway are not apparently any lower than medium English rates. It may be that the maximum English rates really prevail, in which case insurance in Norway is substantially the cheaper for employers; but it wegian rates must be offset the fact that those rates have resulted in a deficiency in the reserves to cover accrued liabilities. It is true that the deficiency was small—only about $400,000—but on the same scale in New York or Pennsylvania a similar error would have resulted in a deficiency of some millions of dollars—no mere trifle to be made up by the public. And this misadventure under the careful Norwegian management indicates a grave danger of state insurance—namely, a tendency to make a good showing for cheap management, leaving it to the taxpayers generally to make good the loss from any probable error.

The Washington scheme is a novel experiment on a small scale, but it is subject to even more dangers than the Norwegian scheme. The Ohio scheme has no requirements for any form of reserves and it has the functions of assessing premium rates and of adjudicating claims confided without rule or limitation to the discretion of a political board of three members, subject to political influences in the direction of low rates and high awards. It, therefore, is subject to vastly greater danger of miscarriage than the Norwegian scheme. Experience and reason both excite the fear that such schemes will result in deficiencies and occasionally in heavy deficiencies. And deficiencies would undoubtedly be most serious evils; for the effect of a deficiency is to transfer the burden of paying compensation from the employers responsible for the injuries, to persons not in any way responsible.

It is a strong argument in favor of state compulsory insurance that the expense of operation in Norway has been calculated to be only 11 per cent, while the corresponding expense of the English companies, under a argument is further weakened by two considerations: (1) So far as expense of operation covers the cost of investigation, etc., requisite for the differentiation of rates in proportion to the actual risks in each trade and under different employers and in different establishments, it is not waste, *but is most desirable even at a high price.* Consequently, so far as state insurance saves expense by ignoring that differentiation where it is material, state insurance is "cheap" only in a derogatory sense—i. e., *it is bad.* (2) In Norway, under state insurance, all payments for compensation (except by several railroads, which are exempted from the law) are subject to this 11 per cent waste. But in England a material proportion of establishments, which pay their compensation obligations regularly, do not insure, or insure themselves and thus escape this waste altogether. And not only that, but under the latitude which the compensation law of England most wisely allows and encourages, but which a compulsory state insurance law would tend to discourage, some large establishments have evolved insurance and compensation schemes of their own—with and without reinsurance—more beneficial to employes and more effective for the prevention of accidents than any general scheme prescribed by any law. That is the ideal for large establishments—more desirable even than the German system at its possible best.*

The most generally avowed object of the American advocates of compulsory insurance is to "distribute" the shock of the cost to employers of compensating for industrial accidents. But distribute among whom? Among the public generally, among all taxpayers, among those in nowise responsible? That is certainly the object towards which distribute the compensation cost would in effect subsidize unnecessary extra-hazardous processes, methods and practices. That object, therefore, deserves the most emphatic condemnation. It is in effect an entirely different proposition from the economic doctrine that the accident cost in production should be distributed among consumers by adding that item in the cost of a product to its price—for that does not mean that the compensation cost in one product should be distributed among other products, but that it should be added to the price of *that particular product, if possible.* Equally objectionable is the purpose of state insurance, which many of the representatives of the working people have in view. They claim that industrial employes are as much the benefactors of the state as soldiers, and deserve to be pensioned by the state for injuries, like soldiers, regardless of expense and of the methods of meeting that expense. But soldiers serve the state while private workmen serve their employers; and for the same reason that the state pensions the disabled soldier, the private employer—not the state nor the public—should compensate the disabled workman.

State insurance, then, is not yet a formulated scheme with a definite object; but its advocates are divided into groups with diverse and inconsistent objects; and its social, industrial and economic effects will vary radically according to the objects towards which its methods, when formulated and defined, are directed. It may be used to throw a part of the accident cost of this generation over upon the succeeding generation, to subsidize the hazardous industries at the expense of the state or of the safer industries, to favor unionized trades at the expense of the non-unionized, or vice versa, etc., in short, it is a screen behind which the cost of compensating for injuries may be shifted in any way and in any proportion that the legislature or the board of officials methods of insurance are prescribed by law. The Board of Awards may tax the employers affected almost as it chooses, may maintain the fund about as it chooses, and may make awards against the fund almost to whom it chooses and upon such evidence as it chooses—without right of appeal in anyone except the claimant. The scheme, therefore, is unformulated, indefinite and easily divertible towards any object that the Board of Awards, in the use or misuse of its discretion, may decide.

The problems involved in the adjudication or allowance of claims for compensation are serious enough to deserve separate consideration. Claims for compensation cannot be indiscriminately allowed; for the tendency to malinger and the opportunities for fraudulent impositions in claims for dependency upon a compensation law are so great as to imperil the success of the whole scheme, unless effectively checked. The German practice of shifting the burden of compensation for the first thirteen weeks of disability onto the sickness insurance fund (to which the working people contribute about two-thirds) tends to check malingering; and the German employers' associations, which, in first instance, pass upon all claims, are diligent to prevent impositions; *nevertheless fraudulent impositions have been so great under the German scheme, as, in the opinion of many close observers, to condemn the whole scheme.* And in every state insurance country of which I have any information on this point—unfortunately, I have none as to Norway—the complaints about malingering and impositions are yet more insistent. And the difficulties of avoiding these abuses would be far greater here than in Europe. For in the Northern countries of Continental Europe all points of information about a workman requisite to avoid impositions in the application of the compensation law in case of an injury to him are

are all facts easily ascertainable and proved. In America, on the other hand, with our lack of vital statistics and unstable and immigrant working population, such necessary facts are infinitely more difficult and expensive to ascertain and often impossible to prove. The opportunities for fraudulent claims for dependency, etc., are, consequently, far greater here than in Europe. *And in order to prevent malingering and exaggerations of disability upon a wholesale scale it will be essential to provide adequate and efficient machinery for a careful and critical investigation of all claims for disability.*

Under compulsory state insurance, the state assumes the liability, the employer is out of it and the whole task of investigating claims will fall upon the state. In New York, for example, there would pour into the state insurance office about 4,000 notices of accidents a month. How would the state deal with them? It should in each case ascertain whether the injury was one entitling the injured person to compensation, i. e., whether it arose out of and in course of the employment, and not from an excepted cause, etc. It should then ascertain the earnings of the injured workman, the nature of his injury and the degree and duration of his disablement—or, in case of fatal injury, the names, ages, residences, relationship, etc., of his dependents. Then, where pensions are allowed, it should continuously observe the pensioners so as to stop or reduce payments upon proper contingencies. And it is a *sine qua non* of the success of a compensation law that all these things should be done justly, according to the law, without partiality, with the lowest practicable margin of error and at minimum expense—for the expenses will be very ma-
for fees—can effectually sift out frauds and exaggerations in such a mass of claims, shows that the magnitude of the problem has been wholly unappreciated.

My conclusion, then, is that in experimenting with state-managed insurance we are playing with fire; that the course of such insurance is uncharted and runs perilously close between the Scylla of Socialism and the Charybdis of organized graft.

P. TECUMSEH SHERMAN.

New York.

CORPORATION—SLANDER BY AGENT.

FENSKY v. MARYLAND CASUALTY CO.

Supreme Court of Missouri, Division No. 1
March 2, 1915.

147 S. W. 416.

A corporation is liable for a slander uttered by its agent while acting in the scope of his employment, and in the actual performance of the duties thereof touching the matter in question, though the corporation had no knowledge and did not ratify the act of the agent.

GRAVES, J. This is an action for slander. In the trial court the plaintiff was cast upon a general demurrer, charging that his petition failed to state facts sufficient to constitute a cause of action. That is the sole question here. The petition reads:

"Plaintiff states that he is and was at all times herein mentioned a regularly licensed attorney at law, and has been practicing his profession in the city of St. Louis, Mo., for the past 15 years; that the defendant, Maryland Casualty Company, is a foreign corporation doing business in the state of Missouri, and is engaged, among other things, in carrying employers' liability insurance.

"Plaintiff further states that on the 8th day of May, 1911, he was employed by one Eugene nues, in said city of St. Louis; that plaintiff's contract of employment was in writing, duly signed by the said Eugene May; and that by reason thereof plaintiff had a property right in said cause of action to the extent of his statutory lien, which said contract is herewith filed and marked Exhibit A.

"Plaintiff further states that the said defendant, Maryland Casualty Company, was assurer for said Polar Wave Ice & Fuel Company, and had contracted and agreed to hold the said Polar Wave Ice & Fuel Company harmless from any and all liability by reason of damage suits, and was, by reason of said contract of assurance, vitally interested in the outcome of the claim of said Eugene May.

"Plaintiff further states that he duly notified the Polar Wave Ice & Fuel Company of his employment in writing by said Eugene May and of his statutory lien on the cause of action, and that the said Polar Wave Ice & Fuel Company in turn notified the said Maryland Casualty Company.

"Plaintiff further states that on or about the 19th day of May, 1911, two agents of the defendant corporation, whose names, to the best knowledge and belief of plaintiff, are Fred Kraemer and —— Hulbert, having in their company the said Eugene May, called on plaintiff at his office in the Times Building, in the city of St. Louis, Mo., and said Fred Kraemer, agent of defendant, while acting within the scope of his employment and in the actual performance of the duties thereof touching the matter in question in the presence and hearing of this plaintiff and of divers other persons, falsely, wantonly, and maliciously spoke of and concerning the plaintiff the following false, malicious and defamatory words, to-wit: 'The contract you (meaning plaintiff) claim to have with this man (meaning May) was not signed by him, and he (meaning May) is here to tell you so. Furthermore the day on which this contract is alleged to have been signed, I saw May, and his hand was so badly hurt and bandaged that he could not have signed his name if he wanted to'— then and there intending to charge and impute, and then and there charging and imputing, to plaintiff, that he had in his possession and was asserting a right under a forged instrument, knowing the same to be forged, which said charge, if true, constitutes a felony under the laws of the state of Missouri, and would subject plaintiff to degrading punishment.

"Plaintiff further states that the said agent of said defendant, while acting within the scope of his employment and in the actual performance of the duties assigned to him by this defendant, procured the said Eugene May, under promise of pecuniary reward, to then and there deny his signature in the presence and hearing of plaintiff and divers other persons; that the false and slanderous language so spoken of and concerning the plaintiff, together with the denial of said Eugene May, so procured as aforesaid, was understood and believed by the persons, in whose presence and hearing the same was uttered, to mean that plaintiff had in his possession and was asserting a right under a forged contract, and that he (the plaintiff) then and there knew the same to be forged.

"Plaintiff further says that the false and slanderous words so spoken of and concerning the plaintiff by defendant's said agent, while acting in the scope of his employment, greatly humiliated plaintiff and has greatly prejudiced him in his good name, fame, and reputation, and has greatly injured him in his profession and business as an attorney at law, to his damage in the sum of $50,000, in actual damages in the sum of $25,000, and in exemplary or punitive damages in the sum of $25,000.

"Wherefore, the premises considered, plaintiff prays judgment against defendant for $25,000 actual damages and for $25,000 punitive damages, and for his costs in this behalf sustained."

(1) I. The demurrer being a general one, we are not advised upon what theory the trial court held this petition bad. In the brief of appellant it is said that the trial court took the view that there was no agency in slander, and a corporation was not liable for the slanderous statements of its agent. We admit that a rule thus broad is announced by Townshend on Slander and Libel (4th Ed.) § 265, whereat it is said:

"As a corporation can act only by or through its officers or agents (section 261), and there can be no agency to slander (section 57), it follows that a corporation cannot be guilty of slander. It has not the capacity for committing that wrong. If an officer or an agent of a corporation is guilty of slander, he is personally liable, and no liability results to the corporation."

This rule has long since been exploded, and rightfully so. The more recent and better rule is well worded in 5 Thompson on Corporations (2d Ed.) § 5441, whereat it is said:

"The general rule makes the corporation liaslander was not uttered with the knowledge of the corporation or with its approval, and though it did not ratify the act of the agent."

To like effect is 1 Clark and Marshall on Private Corporations, p. 627:

"It has been said that a corporation cannot be liable for a slander or oral defamation by its officers or agents, as 'there can be no agency to slander;' and the opinion has also been expressed that a corporation, because of its impersonal nature, cannot commit torts involving the element of malice, since, to support an action for such a tort, 'it must be shown that the defendant was actuated by a motive in his mind, and a corporation has no mind.' This reasoning, however, is unsound. A corporation, it is true, has no mind, and cannot itself entertain malice, but its officers and agents may, and their mental attitude, including their malice, may, like their consent to a contract or their physical acts, be imputed to the corporation. It is well settled, therefore, for this reason, that a corporation may, to the same extent as a natural principle, be liable for the malicious wrongs of its officers or agents, if committed in the course of a transaction which is within the scope of their authority."

And on page 628 the same authority says:

"Thus it has been held that a corporation may, to the same extent as an individual, be liable in an action for libel, or, it seems, for slander or in an action for malicious criminal prosecution or malicious false arrest or imprisonment for malicious prosecution of a civil action, attachment, or other proceeding, for malicious interference with the business of another, for making a false return to a writ, as a writ of mandamus, for example, and for conspiracy, all of which offenses involve a mental element."

Further in a note on page 629, the same authority adds:

"While it is true that a corporation cannot itself speak, and therefore cannot itself slander, neither can a corporation itself make a false representation, and yet a corporation may be liable for the false representations of its agents. For the same reason, it may be liable for a slander by its agents."

In the recent case of Hypes v. Southern Ry. Co., 82 S. C. loc. cit. 317, 64 S. E. 396, 21 L. R. A. (N. S.) 873, 17 Ann. Cas. 620, Mr. Jus-

thority or subsequent ratification. Rucker v. Smoke, 37 S. C. 377, 16 S. E. 40 [34 Am. St. Rep. 758]; Williams v. Tolbert, 76 S. C. 217, 56 S. E. 908; Schumpert v. Railway, 65 S. C. 332, 43 S. E. 813 [95 Am. St. Rep. 802]; Gardner v. Railway, 65 S. C. 342, 43 S. E. 816; Riser v. Railway, 67 S. C. 419, 46 S. E. 47; Dagnall v Railway, 69 S. C. 115, 48 S. E. 97; Fields v. Cotton Mills, 77 S. C. 549, 58 S. E. 608, 11 L. R. A. (N. S.) 822 [122 Am. St. Rep. 593]. The old doctrine that a corporation, having no mind, cannot be liable for acts of agents involving malice, has been completely exploded in modern jurisprudence. While a corporation is nonpersonal in its formal legal entity, it represents natural persons, and must necessarily perform its duties through natural persons as agents, hence must spring the correlative responsibility for the acts of its agents, within the scope of their employment. The liability of a corporation for malicious libel published by its agent in the course of his employment is generally recognized. Philadelphia, etc., Ry. Co. v. Quigley [21 How. 202] 16 L. Ed. 73; Johnson v. St. Louis Dispatch Co. [65 Mo. 539] 27 Am. Rep. 293; Bacon v. Michigan, etc., R. R. Co. [55 Mich. 224, 21 N. W. 324] 54 Am. Rep. 372; Mayard v. Firemen's Fund Ins. Co. [34 Cal. 48] 91 Am. Dec. 672; Fogg v. Boston, etc., R. R. Co. [148 Mass. 513, 20 N. E. 109] 12 Am. St. Rep. 583; Missouri Pacific Ry. v. Richmond [73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280] 15 Am. St. Rep. 794; 10 Cyc. 1215; 18 Ency. Law, 1058. We do not regard the distinction between written and unwritten slander to be of sufficient importance to warrant the application of a different rule. The written slander is not always or necessarily more public than the spoken; and if it may indicate more deliberation, and hence warrant more easily the inference of malice, the difference is merely in degree, not in kind."

So, too, in the case of Rivers v. Railway Co., 90 Miss. loc. cit. 211, 43 South, 472, 9 L. R. A. (N. S.) 93 Whitefield, C. J., says:

"The doctrine has long been exploded that a corporation is not liable for slander because, as it was ridiculously expressed, there could be 'no agency to slander.' The true doctrine is that set forth in Clark & Marshall on Corporations, vol. 1, pp. 627-629."

The learned jurist then quotes from the text as we have quoted supra. In our own state this modern rule as to slander is fully doctrine long recognized) and yet not liable for slander—unwritten libel or defamation of character. Under the modern rule, the corporate shell will not shield the corporation from the ill effects of the slanderous tongue of its agent, if, at the time, the agent was transacting for the corporation the business of the corporation, and the slander was uttered in the course of such business, and in connection therewith. As an individual I cannot go to another individual to adjust an account with him, and in the course of so doing publicly denounce him as a thief. Nor should a corporation, through its agents, be able to thus denounce a citizen, and escape liability. This phase of the case (i. e., the character of the agent) we discuss later. It is sufficient to say at this juncture that the corporation is not relieved from liability upon the theory that there "is no agency to slander." If this was the theory nisi, and there were no other questions in the case, the judgment cannot be sustained. * * *

The doctrine of "no agency to slander" and "the corporation can't slander because it can't talk" having been fully exploded, it is liable in slander just the same as for any other tort. It is not liable for any tort which is not committed in the course of the agent's employment.

We think a liberal construction of this petition (which construction we are entitled to give it upon a mere formal demurrer) shows that a cause of action was stated, and the trial court erred in sustaining the demurrer thereto.

The judgment nisi is reversed, and the cause remanded. All concur.

Note.—*Liability of a Corporation for Slander by an Agent in Furtherance of Its Business.*—The instant case does not distinguish, if there may be a distinction, between libel and slander committed by an agent in furtherance of a corporation's business. All of its argument may be admitted so far as libel is concerned and the question remain open, so far as slander is concerned. Thus, a Kentucky court, after citing a number of cases holding corporations liable for libel, says: "A partnership or corporation cannot be held liable for the slanderous utterances of its agents or servants unless the actionable words were spoken by its express consent, direction or authority, or are ratified or approved by it." Duquesne Distilling Co. v. Greenbaum, 135 Ky. 182, 121 S. W. 1026, 21 Anno. Cas. 481.

It is to be noted that all of this is not required in a libel case, but this action stands like the master or principal in slander for defamatory words spoken by his agent or servant. Slanderous words are easily spoken, are usually uttered under the influence of passion or excitement, and more frequently than otherwise are the voluntary thought and act of the speaker. Or, to put it another way, the words spoken are not generally prompted by or put into the mouth of the speaker by any other person, and represent nothing more than his personal views or opinions about the person or thing spoken of. If principals or masters could be held liable for every defamatory utterance of their servants or agents while in their service, it would subject them to liability that they could not protect or guard against. No person can reasonably prevent another, not immediately in his presence, from giving expression to his voluntary opinions, however defamatory they may be." The court proceeds at considerable length in development of this idea, concluding with the statement that: "To lay down a rule like this would be ruinous to persons who are obliged in the conduct of their business to employ agents or servants." Otherwise is the rule "where the principal directs or authorizes the agent to speak certain words, or if with knowledge of their speaking he approves or ratifies them."

This case was confirmed in Stewart D. G. Co. v. Heuchter, 148 Ky. 228, 146 S. W. 423, and a number of cases cited in support of the ruling.

In Singer Mfg. Co. v. Taylor, 150 Ala. 514, 43 So. 210, 9 L. R. A. (N. S.) 929, 124 Am. St. Rep. 90, it was said: "By reason of the fact that the offense of slander is the voluntary and tortious act of the speaker, and is more likely to be the expression of momentary passion or excitement of the agent, it is, we think, rightly held that the utterance of slanderous words must be ascribed 'to the personal malice of the agent, rather than to an act performed in the course of his employment and in aid of the interest of his employer, and exonerating the company unless it authorized or approved or ratified the act of the agent in uttering the particular slander.'"

In McIntire v. Cudahy Pkg. Co., Ala., 60 So. 848, the Taylor case is approved and there is a quotation from Odgers on Libel and Slander, also approved as follows: "A corporation will not, it is submitted be liable for any slander uttered by an officer, even though he be acting honestly for the benefit of the company, unless it be proved that the corporation expressly ordered and directed that the officer say those very words; for a slander is the voluntary tortious act of the speaker."

And it seems the rule in North Carolina that it must be alleged and proved that there was authority to utter a slander or that it was ratified. Redditt v. Singer Mfg. Co., 124 N. C. 100, 32 S. E. 392. See also Behre v. Nat. C. R. Co., 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320.

In Kane v. Ins. Co., 200 Mass. 265, 86 N. E. 302, a case failed because there was no proof of actual authority given to the slanderous statements, or that they were made with the corporation's stant case and it cites many authorities, but neither it nor they allude to the distinction drawn by the Greenbaum case, *supra*, and others following on the same line that the act complained of is the mere individual tortious expression of opinion.

We think, that this distinction is sound, as it certainly is presumptively no qualification for an agent to possess the mere ability to abuse another and if he gives way to anger this is a frailty owing to temperament, of the existence of which in an agent one might be entirely ignorant. Besides all of these cases admit that if slanderous words are expressly ordered to be spoken or are subsequently ratified the corporation is liable. It well might be that if a corporation were shown to practice intimidation in its methods little, if anything, more would be needed for a jury to conclude rightfully, that slander by its agents was contemplated when they were sent out. C.

ITEMS OF PROFESSIONAL INTEREST.

THE STORY OF THE OHIO BAR ASSOCIATION.

This story is the first of a series of short sketches giving the history and achievements of the various state bar associations.

The Ohio Bar Association was organized July 8, 1880, its first president being Judge Rufus P. Ramney, one of the most distinguished jurists that ever sat on the bench in Ohio. The growth of the Association at first was slow but in later years has been quite rapid, and the interest taken in the Association meetings has been greater, which is probably true of all Bar Association meetings.

During the thirty-five years of its existence the Ohio Bar Association has actively supported many reforms, having for their purpose the improvement of the law or its administration. Thus, at different times they have advocated and secured the adoption of the following, to-wit: (1) A new appellate court instead of the former reviewing court, composed of, in part at least, the same judges who had tried cases below; (2) the subject of Legal Ethics was made prominent and its enforcement urged throughout the state and the study of it made a part of the curriculum necessary for admission to the bar; (3) time for prosecuting error was shortened; and their ratification secured by the people or by the legislature; (4) the Association has supported the Commission on Uniform State Laws in securing the adoption of the Uniform Negotiable Instruments Law and the Uniform Sales Act; (5) salaries of judges of the appellate and of the supreme courts, which were ridiculously low, were increased on the request of the Association.

At the last meeting of the Association at Cedar Point, July 7 and 8, the Association voted to conform their plans for reforming procedure to those of the American Bar Association, and passed a resolution asking the legislature to empower the chief justice to name a commission of judges having authority to make rules regulating matters of pleading, practice and procedure and various courts of the state.

The aforesaid items stand out prominently among the achievements of the Ohio Bar Association but do not, of course, fully catalogue all the reforms undertaken by this Association.

For more than twenty-five years the Association has been meeting in July on Lake Erie; for about twenty years at Put-in-Bay, and for the last six or seven years at Cedar Point, where the next session will be held July 6, 7 and 8, 1915. The president for this year is Judge John N. Van Deman, of Dayton.

Judge Van Deman is a lawyer of the old school who finds time to take an active part in achieving the ideals of his profession, at the same time giving close attention to the prosecution of his private practice. Judge Van Deman began the practice of law in Washington, Ohio, in 1877. In 1894, he filled a short vacancy on the common pleas bench. In 1898, he removed to Dayton, where he has since continued in the practice of law, his present connection being with the firm of Van Deman & Vorys.

Judge Van Deman has been a member of the Ohio Bar Association and a regular attendant at its meetings for thirty years, having been at all times one of its most active and useful members; and for thirteen years has been a member of the American Bar Association. He is usually found in attendance at all the meetings of both these Associations, and a perusal of the Ohio State Bar Association reports will disclose the fact that he has taken a prominent part in all of its discussions.

The last meeting of the Ohio Bar Association was memorable by reason of the very inter-

The Association gave much time to the consideration of the non-partisan judiciary law, finally reaching the conclusion that while there was much yet to be desired in the selection of the judiciary, that the non-partisan was better than the political convention plan. Most of the members, however, from the printed report of their discussions, appeared to be in favor of the appointive system, although they were quite ready to admit that that plan is quite impossible of adoption at this time.

One of the interesting facts disclosed at the last meeting by Chief Justice H. L. Nichols, of the Supreme Court of Ohio, was to the effect that that court was up with its docket, which created loud applause, and was indeed worthy of receiving such applause. The statement of Judge Nichols was to this effect: "We have reached that status when every submitted case has been disposed of, and by, say, the first of next July the Supreme Court of Ohio will be up with its docket on orally argued cases."

The following are the officers of the Association for the present year:

President, John N. Van Deman, Dayton; Secretary, Chas. M. Buss, Cleveland; Treasurer, Clement R. Gilmore, Dayton. Chairmen of the following Committees: Executive, Edmund B. King, Sandusky; Judicial Administration and Legal Reform, Allen Andrews, Hamilton; Admission, Louis B. Sawyer, Cincinnati; Legal Education, U. L. Marvin; Grievances, Herbert W. Mitchell, St. Clairsville; Legal Biography, Wm. J. Geer, Galion; Legislation, Edward C. Turner, Columbus.

The Association has 1,148 members, about one-fifth of the bar of the state. A. H. R.

BAR ASSOCIATION MEETINGS FOR 1915—WHEN AND WHERE TO BE HELD.

Arkansas—Fort Smith, June 1 and 2.
Florida—Atlantic Beach, July 23 and 24.
Georgia—St. Simon's Island, June 3, 4, and 5.
Illinois—Quincy, June 11 and 12.
Kentucky—Frankfort, July 8 and 9.
Maryland—Cape May, N. J., July 7, 8 and 9.
Minnesota—St. Cloud, August 5, 6 and 7.
Mississippi—Vicksburg, May 4.
Montana—Billings, August 13, 14 and 15.
New Jersey—Atlantic City, June 11 and 12.

HUMOR OF THE LAW.

Young Long Brief hung a shingle out
To show his LL. B.,
And from A. M. to late P. M.
His office was M. T.
—Law Student's Helper.

Judge—Did you, last night, really call this man imbecile and idiot?

The Accused (gathering his wits)—I have some doubt of it; but the more I look at him, the more I think it possible—Law Student's Helper.

In a Western state the district attorney was arguing for conviction in a cattle stealing case. After he was through a brother attorney asked him how many hides a steer had, as he had told the jury that there was found in defendant's possession "one of the hides of a steer." He replied: "I did not say any such thing. I said one of the hides of one of the steers."

Representative Joseph Taggart, of Kansas, is a man brimming with epigrams and bits of philosophy—if he chooses to spring them. Being modest, he doesn't show his goods to everybody; but occasionally he pulls a sample within sight of all. The other day somebody was talking about a certain congressman who has a way of getting all "het up" and making a "great-to-do" over accomplishing small things.

"Yes," said Taggart, "that fellow invariably hitches a Corliss engine up to a gimlet."—St. Louis Globe-Democrat.

At one time Sergeant Manning, a very nervous man, was arguing a case before the judges of the Common Pleas in England. He had a large number of books before him, almost enough to constitute a library. While he was reading the report of one of the cases, a number of books tumbled off the table in front of him.

"My lords," said the sergeant, nervously, "it it reported in two other books in these exact words."

"Are you sure," asked Justice Maule, "that it is exactly the same?"

"Certainly, my lords," replied Manning, earnestly.

"Well, then," said Justice Maule, gravely, "why hunt for the other books? Read the same case again out of the one you have in your hand."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Abatement and Revival**—Survivorship.—A bill to enjoin certain stockholders of a corporation from removing its books and papers from the courts' jurisdiction did not survive the death of one of the defendants against his executors.—Conley v. Huntoon, R. I., 92 Atl. 865.

2. **Adverse Possession**—Claim of Right.—Where a railroad company under a claim of right had continuous, exclusive, adverse, open, and notorious possession of a strip of land used as a right of way for 50 years, it acquired title by adverse possession.—Town of New Point v. Cleveland, C., C. & St. L. Ry. Co., Ind., 107 N. E. 560.

3.——Defined.—Under a deed to sons reserving to the grantor an estate during his life and the lives of his daughters, possession of a son held not adverse to the daughters, where they also lived on the land during their lives.—Brown v. Brown, N. C., 84 S. E. 25.

4.——Payment of Taxes.—Where is was admitted that the son of plaintiff's intestate, under whom defendant's intestate claimed, had paid taxes on the land in dispute, at a certain valuation, "as shown in the digests," state and county tax receipts to such person were admissible on the issue of adverse possession.—Causey v. White, Ga., 84 S. E. 58.

5. **Assignments for Benefit of Creditors**—Personal Liability.—Assignee for the benefit of

6. **Attorney and Client** — Compensation.—Where attorneys contracted to render services for a fixed sum, they were not precluded from recovering on a subsequent contract for additional compensation for non-contemplated services rendered in the same matter.—Bishop v. Vaughan, Mo., 172 S. W. 644.

7. **Bailment**—Burden of Proof.—The bailor has the burden of proving that the bailee's negligence caused the destruction of the article bailed, although proof of destruction alone raises a presumption of negligence requiring the bailee to go forward with evidence.—Hanes v. Shapiro & Smith, N. C., 84 S. E. 33.

8. **Bankruptcy**—Discharge.—Where discharge in bankruptcy was not pleaded as a defense to an action on debt, judgment thereon was not subject to collateral attack, but was enforceable by arrest or levy.—Herschman v. Bolster, Mass., 107 N. E. 543.

9.——Homestead.—A bankrupt is not precluded from claiming a homestead as exempt because prior to adjudication he had failed to designate the same under the state laws, if he perfects his claim thereunder within a reasonable time after claiming the homestead.—Brandt v. Mayhew, U. S. C. C. A., 218 Fed. 422.

10.——Rescission.—Seller of goods to insolvent, in order to rescind and recover the goods, must show insolvency, concealment, and intent not to pay for the goods, at the time of purchase.—In re K. Marks & Co., U. S. C. C. A., 218 Fed. 453.

11.——Waiver.—An alleged bankrupt, by pleading to the merits in its answer and otherwise submitting to the jurisdiction, held to have waived its objection that the proceeding was not brought in the division of its domicile.—Clark-Herrin-Campbell Co. v. H. B. Claflin Co., U. S. C. C. A., 218 Fed. 429.

12. **Bills and Notes**—Blank Spaces.—Under Rev. St. 1909, § 9985, one who signs a note in blank gives the payee prima facie authority to complete it, but the payee cannot hold the maker unless the note is completed according to instructions.—Exchange Bank v. Robinson, Mo., 172 S. W. 628.

13.——Consideration.—Under Gen. St. 1906, §§ 2962, 2985, 2988, an executory contract constituting the sole consideration for a note, and a breach of such contract, may be shown in defense in an action on the note by a holder who took with knowledge of the contract.—Sumter County State Bank v. Hays, Fla., 67 So. 109.

14. **Boundaries**—Monuments.—Monuments or plain lines of location must generally prevail over acts of user or attempted jurisdiction by municipal authorities in determining territorial boundaries.—Commonwealth v. Stahr, Ky., 172 S. W. 677.

15. **Brokers**—Commissions.—Where a landowner sells to a purchaser found and introduced by the broker, he cannot escape payment of commissions on the ground that he sold at a less price than communicated to the broker.—

price and the price named in the contract with the purchaser.—Sperry Realty Co. v. Merriam Realty Co., Minn., 150 N. W. 785.

17.——Procuring Cause of Sale.—A broker who agreed that the owner might sell the property during the time it was listed with him cannot recover compensation for a sale made directly by the owner, of which he was not the procuring cause.—Tebo v. Weld, Del., 92 Atl. 876.

18. **Carriers of Live Stock**—Estoppel.—Where a shipper of live stock without knowledge of its contents, hurriedly signed a contract for interstate shipment at the request of the carrier's agent, just as the train was starting, he was not bound thereby.—Gulf, C. & S. F. Ry. Co. v. Vasbinder, Tex., 172 S. W. 763.

19. **Carriers of Passengers**—Discrimination. —Discrimination between purchasers of mileage books and of trip tickets held not to render Laws 1913, c. 92, invalid, if the discrimination is produced by an unreasonable overcharge for trip tickets.—State v. Maine Cent. R. R. Co., N. H., 92 Atl. 837.

20.——Freight Trains—A carrier, receiving passengers on freight trains, must afford them reasonable opportunity to board and alight, and must guard against dangers which reasonable prudence could avoid.—Doran v. Chicago, St. P., M. & O. Ry. Co., Minn., 150 N. W. 800.

21. **Charities**—Cy Pres.—In the absence of any scheme judicially approved, the trustees of a charity cannot make a cy pres application of the estate on their own authority, even though it be desirable.—Lakatong Lodge, No. 114, of Quakertown v. Board of Education of Franklin Tp., Hunterdon County, N. J., 92 Atl. 870.

22. **Constitutional Law**—"Blue Sky Law."—A court of equity will not inquire into the constitutionality of a state "blue sky law" at suit of a corporation whose plan of doing business indicates on its face that it is intended to defraud.—National Mercantile Co. v. Keating, U. S. D. C., 218 Fed. 477.

23.——Civil Service Law.—Civil service law, authorizing civil service commission to provide rules as to civil service, are not a delegation of powers to enact laws in violation of Const. art. 1, § 18.—Green v. State Civil Service Commission, Ohio, 107 N. E. 531.

24.——Police Power.—One constructing an apartment house under a permit from the city and in accordance with the then existing ordinance does not acquire a vested right of exemption from a subsequent reasonable exercise by the city of the police power to enact an ordinance requiring the installation in such houses of fire appliances.—Williams v. City of Chicago, Ill., 107 N. E. 599.

25.——Reasonable Rates.—The legislature cannot prevent the courts from passing upon the

27. **Contracts**—Consideration.—Where defendant gave notes secured by a mortgage for the price of a threshing outfit, his agreement with the seller not to defend a suit on the notes if he was relieved of personal liability is supported by a sufficient consideration.—Gaar, Scott & Co. v. Vanhook, Ky., 172 S. W. 680.

28. **Corporations**—Individual Debt. — President, principal stockholder and controlling spirit of corporation, held not authorized to use its bank deposit in payment of an individual debt to the bank, and his direction to the bank did not authorize it to so use it.—Buena Vista Veneer Co. v. Hodges, Ark., 172 S. W. 868.

29.——Notice.—Plaintiff's cashier held not chargeable, in the absence of actual knowledge or negligence, with notice of a requirement of the by-laws of the defendant corporation that no note should be valid unless signed jointly by its president and treasurer.—Grant County State Bank v. Northwestern Land Co., N. D., 150 N. W. 736.

30. **Courts**—Jurisdiction.—The appointment or a reciver for a corporation by a state court, with authority to bring suit on a cause of action existing in favor of the corporation, if the court obtained jurisdiction, excludes the right of a receiver, subsequently appointed by a court of another state, to maintain a suit on the same cause of action.—Lively v. Picton, U. S. C. C. A., 218 Fed. 401.

31. **Criminal Evidence**—Blood Hounds. — After testimony as to the qualification of bloodhounds for trailing criminals, evidence of their performance in taking the trail at a place where hogs escaped from a ranch, and following it to defendant's house, held admissible.—Holub v. State, Ark., 172 S. W. 878.

32. **Criminal Law**—Appeal and Error.—The question on an appeal from a conviction of murder, where no exceptions were reserved, is whether the jury could believe beyond a reasonable doubt that accused committed the homicide with malice aforethought, express or implied.—State v. Mulkerrin, Me., 92 Atl. 785.

33. **Death**—Damages.—The amount recoverable in an action under the federal Employers' Liability Act for the death of a brakeman, being controlled solely by such act and not by the state law limiting to $10,000 the amount recoverable for death, is limited only to the damages actually sustained.—Devine v. Chicago, N. I. & P. Ry. Co., Ill., 107 N. E. 595.

34.——Mortality Tables.—Tables of the probable length of life and its probable worth, though admissible, are not conclusive or essential on the question of expectancy of life.—Standard Oil Co. v. Reagan, Ga., 84 S. E. 69.

35. **Deeds**—Insane Grantor. — A grantor, though not positively insane, may be so incapacitated as to be unable to guard himself against imposition or to restrain importunity, and therefore be incompetent to execute a deed. —Jones v. Travers, Ark., 172 S. W. 828.

36. **Disorderly Conduct**—Ordinance.—It is not essential to the violation of an ordinance prohibitng the making of any unnecessary noise, hibiting the making of any unnecessary noise, derly, that the noise shall disturb more than one person.—Garvin v. City of Waynesboro, Ga., 84 S. E. 90.

37. **Divorce**—Defense.—A defendant should on request be permitted to defend in a divorce case at any time before the final decree is signed, except where clearly wanting in good faith.—Grant v. Grant, N. J., 92 Atl. 791.

38.——Reserving Decree.—Judgment of divorce will be reserved and annulled, where after perfection and submission of appeal the appellate court is shown that the parties have set-

40. **Elections**—Illiteracy of Voter.—A voter is not illiterate if he can read in a reasonably intelligible manner sentences composed of words in common use, of average difficulty, and can write if by alphabetical signs he can express words in a fairly legible way.—Justice v. Meade, Ky., 172 S. W. 678.

41. **Embezzlement**—Continuing Offense.—Several indictments, in terms permitted by Gen. Laws 1909, c. 345, § 18, construed with the bill of particulars, and held not to charge a continuing offense subject to one prosecution only and to one penalty up to the time of the indictment.—State v. Davis, R. I., 92 Atl. 821.

42. **Estoppel**—Husband and Wife.—A wife permitting her husband to use her property under such circumstances as to justify his creditors in believing that it is his is estopped to assert title against the creditors.—Miller Watt & Co. v. Mercer, Iowa, 150 N. W. 694.

43.——Pleadings.—A plea in ejectment held insufficient as a plea of estoppel, where it failed to allege that defendant and his grantors were misled by plaintiff's conduct.—State v. Heaphy, Vt., 92 Atl. 813.

44.——Silence.—The silence of children who did not know of their claim to the land as heirs of their mother does not estop them from asserting such claim against grantees under deeds of trust given by their father.—Watson v. Vinson, Miss., 67 So. 61.

45. **Evidence**—Opinion.—In a suit involving the boundaries intended by a timber deed, a question as to whether the grantor understood that a corner mentioned in the deed was the point located by her son and agent, when they showed the property to the grantees, is not improper as calling for a conclusion.—Newton v. American Car Sprinkler Co., Vt., 92 Atl. 831.

46. **Executors and Administrators**—Disbursements.—In an action to recover disbursements for the benefit of an estate, an item for a certain amount of taxes paid could be supported by evidence of different payments of different amounts all tending to make up the sum stated.—Littlefield v. Cook, Me., 92 Atl. 787.

47.——Gratuitous Services.—Where a daughter took her mentally incompetent mother into her home, and rendered her services as a member of the daughters' family, without expectation of compensation, they were not a charge on the mother's estate.—In re Squire's Estate, Iowa, 150 N. W. 706.

48. **Explosives**—Evidence. — Testimony that witness had used kerosene oil for many years in a particular manner held admissible as tending to indicate that the person injured from an explosion of kerosene with which she was starting a fire was not guilty of gross negligence.—Standard Oil Co. v. Reagan, Ga., 84 S. E. 69.

49. **False Pretenses**—Opinion Evidence.—An expression of opinion that the land traded contained ten acres, when, in fact, it contained only five acres, held not to constitute such a false pretense as rendered defendant criminally liable.—Walker v. State, Fla., 67 So. 94.

50. **Ferries**—Abandonment.—The owner of a ferry privilege may not have injunction against infringement, where failing to furnish adequate and safe accommodations, amounting to temporary abandonment of rights.—Crane v. Jackson, Ark., 172 S. W. 890.

51. **Fraudulent Conveyances**—Estoppel.—That a husband, without his wife's knowledge, failed to pay his creditors from the proceeds of a notes for debts at their maturity, unless the firm consented to the extension of time.—Carson v. J. L. Mott Iron Works, Va., 84 S. E. 12.

54. **Homicide**—Bad Character.—In a prosecution for defendant's murder of her husband, detailed evidence as to her conduct held inadmissible, under the rule that accused cannot be found guilty of the offense charged by proving bad character or other independent specific acts of reprehensible nature.—State v. Brazzell, Iowa, 150 N. W. 683.

55.——Cause of Death.—Where lockjaw, directly causing decedent's death, resulted from knife wounds inflicted by accused, death was caused by the wounds.—State v. Harmon, Del., 92 Atl. 853.

56.——Justifiable. — Homicide is justifiable when committed in the belief based on reasonable ground, that it is necessary to save the slayer from death, or great bodily harm, even though the slayer is mistaken.—Napier v. State, Ohio, 107 N. E. 535.

57.——Self-Defense.—One relying on self-defense must show that he had reason to believe that he was in imminent danger of great physical harm or loss of life at the hands of decedent.—State v. Mulkerrin, Me., 92 Atl. 785.

58. **Homestead**—Forfeiture.—Where a wife, without fault of the husband, voluntarily separates from him and leaves the homestead, which is his separate property or community property, she forfeits her homestead right therein.—Gardenhire v. Gardenhire, Tex., 172 S. W. 726.

59. **Husband and Wife**—Antenuptial Agreement.—Where husband and wife made an antenuptial agreement for the payment of $12,000 by him to her, she relinquishing all rights in his estate, the agreement will be enforced in equity, although the wife separated from him.—Schnepfe v. Schnepfe, Md., 92 Atl. 891.

60.——Community Interest.—A husband cannot defeat his wife's community interest in the real property by a sale thereof made with that intent, of which intent the purchaser had notice.—Gardenhire v. Gardenhire, Tex., 172 S. W. 726.

61.——Survivorship.—The survivor can be sued and property in his hands as such subjected to payment of community debt, but separate estate of the husband, which is also liable for payment of such debt, cannot be reached in suit against surviving wife.—First Nat. Bank of New Boston v. Daniel, Tex., 172 S. W. 747.

62.——Tort of Wife.—Common-law rule as to husband's civil liability for torts of his wife in action where they are joined and charged with conspiring a wrong held not changed by Rev. St. 1909, § 304, authorizing a married woman to sue and be sued without joining her husband.—Aronson v. Ricker, Mo., 172 S. W. 641.

63. **Indictment and Information**—Disjunctives.—Where a statute defines a crime in the disjunctive, it is sufficient to charge the offense in the language of the statute, using the conjunctive unless the words are repugnant, and a part of the substance of the offense.—State v. Curtis, Mo., 172 S. W. 619.

64. **Insurance**—Fraternal Order.—Provisions of constitution of a fraternal order, by the terms of its certificate of insurance constituting material parts thereof, were binding upon the insured and the beneficiaries.—Howton v. Sovereign Camp Woodmen of the World, Ky., 172 S. W. 687.

65.——Mistake.—Policy of burglary insurance, tenant, place any signboard on the building in such a way as to interfere with the quiet use of the property by the tenant.—Reynolds v. Clark, Del., 92 Atl. 873.

68.—**Libel and Slander**—Privilege.—Where a person, to whom an inquiry as to a servant's character is made, answers that he has information as to a fact, as distinguished from a statement that the fact exists, his privilege does not depend on whether he in good faith believes the fact.—Doane v. Grew, Mass., 107 N. E. 620.

69. **Limitation of Actions**—Estoppel.—Surety on contractor's bond, who mistakenly represented to materialman that he was liable for materials, held not estopped from pleading limitations in action for such false representations, and limitations ran from the time the materialman saw or might have seen the bond.—Dean v. A. G. McAdams Lumber Co., Tex., 172 S. W. 762.

70. **Master and Servant**—Abrogation of Rules.—A rule for the protection of employes may be abrogated by a general custom built up within the knowledge of those whose duty it is to enforce the rule or to report infractions thereof.—Chicago, R. I. & P. Ry. Co. v. Smith, Ark., 172 S. W. 829.

71.——Assumption of Risk.—Plaintiff engaged in knapping rock, held not to have assumed the risk of being struck by a piece of rock knocked down or rolled down while a fellow servant, under their foreman's direction, was breaking rock on a slope behind him.—Burton Const. Co. v. Metcalfe, Ky., 172 S. W. 698.

72.——Change of Employment.—Where, in an action for salary, plaintiff had testified to a change of his employment, it was error to refuse to allow a witness for defendant to state the extent of the extra work which plaintiff testified had been imposed upon him.—Tampa Drug Co. v. Berger, Fla., 67 So. 97.

73.——Change of Relation.—Fact that the regular employe who was sick, hired plaintiff as a substitute, receiving his own regular wages, held not to change plaintiff's relation to master, who owed him the same duty as if its manager had employed him.—Garretson-Greeson Lumber Co. v. Goza, Ark., 172 S. W. 825.

74.——Licensee.—One employed by a railroad who uses a certain spot along the track selected by himself and of a known dangerous character has the rights merely of a licensee, and takes his own risk.—Connell v. New York Cent. & H. R. R. Co., N. Y., 107 N. E. 568.

75.——Safe Place.—Where the servant works in a place necessarily rendered dangerous by some independent work of the master, the master must control the independent work while the servant is so engaged—Arveson v. Boston Coal, Dock and Wharf Co., Minn., 150 N. W. 810.

76.——Volunteer.—That decedent's services were being given at the request of an assistant to another employe in charge of the work and not by the other employe himself held not to render decedent a mere volunteer.—Hitchcock v. Artic Creamery Co., Iowa, 150 N. W. 727.

77. **Mechanics' Liens** — Commencement of Suit. — The commencement of a suit by a materialman within 90 days after the last material is furnished fixes a lien against the owner's property and dispenses with the necessity of 10 days' notice to the owner of an intention to claim a lien and the filing of the account upon which it is claimed with the circuit clerk.—Simpson v. J. W. Black Lumber Co., Ark., 172 S. W. 883.

78. **Monopolies**—Restraint of Trade.—The fact alone that a manufacturing corporation has largely increased its business by purchasing the plants and business of other concerns does not effect an undue restraint of trade, within the meaning of Sherman Anti-Trust Act, §§ 1, 2.—

80. **Municipal Corporations**—Abutting Owner.—A municipality may enforce a lien against an abutting owner for sidewalks, though it had the work done by a foreign corporation not registered as required by Acts 1907, c. 5717.—Campbell v. Daniell, Fla., 67 So. 90.

81.——Charter Powers.—Municipal corporations may acquire real and personal estate by gift, bequest, or devise for the purposes of their creation, and a gift unqualified in its terms will be limited to such purposes.—Cramton v. Cramton's Estate, Vt., 92 Atl. 814.

82.——Civil Service Law.—Civil service law does not confer power on the state civil service commission to investigate the conduct of a mayor of a city with reference to his enforcement of the civil service law.—Green v. State Civil Service Commission, Ohio, 107 N. E. 531.

83.——Contributory Negligence.—One injured in a collision between an automobile and a bicycle could not recover, unless defendant was negligent and he was free from negligence proximately contributing to the accident.—Travers v. Hartman, Del., 92 Atl. 855.

84.——Street Improvement.—Fact that the foundation was approved by engineer without objection by contractor that foundation used would impose burden which he had not agreed to assume held not to relieve him from liability under maintenance bond to repair defects resulting from such foundation.—English v. Shelby, Ark., 172 S. W. 817.

85.——Joint Tortfeasors.—Where a railroad company constructs its road over a city street under a permit from the city, a person injured by its negligence may recover from thecity or the company, or both.—Cushman Motor Works v. City of Lincoln, Neb., 150 N. W. 821.

86.——Street Assessments.—The extension of time for the completion of street paving as authorized by the contract does not invalidate the assessments therefor unless unreasonable.—F. M. Hubbell, Son & Co. v. City of Des Moines, Iowa, 150 N. W. 701.

87.——Vacating Streets.—Municipalities exercising the power to vacate streets must do so within the constitutional limitation that their acts must be for some public use, but their motives cannot be judicially investigated.—City of Indianapolis v. Maag, Ind., 107 N. E. 529.

88. **Navigable Waters** — Riparian Rights. — Title to the water of the river above tide and between the termini of the James river and the Kanawha canal is vested in the commonwealth and its grantees, and not in its riparian proprietors.—Grant v. Chesapeake & O. Ry. Co., Va., 84 S. E. 9.

89. **Negligence**—Highway.—One using a traction engine along a public road must use the care a reasonably prudent and careful person would use to prevent burning property along the road.—Cecil v. Mundy, Del., 92 Atl. 850.

90. **New Trial**—Grant of.—Where the leading averments of a complaint showed that title was only incidentally involved, and that the real question was the location of a boundary and right to injunctive relief, defendants were not entitled to a new trial as of right.—Nesbit v. English, Ind., 107 N. E. 552.

91. **Nuisance**—Election.—One who assisted a city to construct a dam, and thereafter purchased land thereby flooded, cannot elect to treat the dam as a nuisance and have it abated.—Irvine v. City of Oelwein, Iowa, 150 N. W. 674.

92. **Parent and Child**—Damages. — Father, whose son was injured through defendant's negligence, held entitled to reasonable compensation for expenditures for medicines and medical attendance, and for permanent loss of services during minority, if any.—Travers v. Hartman, Del., 92 Atl. 855.

93. **Partnership**—Joint and Several Liability.—Where members of a firm signed a note in-

ing party should receive as compensation for services one-half of the profits of the business held not a contract of partnership.—Falk v. La Grange Cigar Co., Ga., 84 S. E. 93.

95. **Railroads**—Look and Listen.—Plaintiff stopping at a crossing listening for a train but hearing none, relying on a custom to give a signal, who, had he looked, could not have seen train, held not bound, as a matter of law, to look up or down the track.—Doody v. Boston & M. R. R., N. H., 92 Atl. 801.

96.——Warning.—If platform between two tracks, on one of which train was standing, was unusually dangerous, company held bound to use some reasonably effective means of warning those on the platform that another train was approaching.—Louisville & N R. Co. v. Senney's Adm'r., Ky., 172 S. W. 683.

97. **Receiving Stolen Goods**—Evidence.—In a prosecution for receiving one stolen pool ball, testimony that the accused at about the same time received other balls from the same person is admissible to show knowledge.—Henderson v. State, Tex., 172 S. W. 793.

98. **Removal of Causes**—Removability.—A suit by a city to restrain a telegraph company from doing intrastate business in the city without having paid a license tax imposed by a city ordinance, for violations of which it was subject to a fine of not less than $10 nor more than $100 for each day it did business in violation of the ordinance, held not a "suit of a civil nature," and therefore not removable to the federal court.—City of Montgomery, Ala., v. Postal Telegraph-Cable Co., U. S. D. C., 218 Fed. 471.

99. **Sales**—Evidence.—Where a contract of sale was signed only by the buyer, but the oral agreement was proved by the testimony of the seller, the admission of evidence of interviews and negotiations which resulted in the sale and delivery to the buyer was not erroneous.—Ney v. Wrenn, Va., 84 S. E. 1.

100.——Guaranty.—Whether guaranty on sale of stallion that was a sure breeder, and that if not he might be returned at a date too early to test his breeding qualities, was unreasonable, held for court and not for jury.—Holland Banking Co. v. Hearn, Ark., 172 S. W. 881.

101.—Passing of Title.—Where a seller has done all required of him, and the counting, weighing, testing, etc., to ascertain the price must be done by the buyer, title passes, unless a contrary intention appears.—G. I. Frazier Co. v. Owensboro Stave & Barrel Co., Ky., 172 S. W. 652.

102.——Standing Timber.—Under contract to sell standing timber of specified size to be inspected and branded by purchaser's agents, purchaser held not bound to take trees of smaller size branded by its agents.—Ellswick v. Yellow Poplar Lumber Co., Ky., 175 S. W. 675.

103.——Warranty.—A warranty that cantaloupes "to be shipped" are "free of split ends and not over-ripe" is complied with where the melons are in the warranted condition when delivered to the railroad.—Williams-Thompson Co. v. Marshburn, Ga., 84 S. E. 90.

104.——Warranty.—A buyer, having elected to allow a seller to make good his warranty by repairing defective furniture, cannot after the destruction of the article sue upon the warranty. —Hanes v. Shapiro & Smith, N. C., 84 S. E. 33.

105. **Specific Performance**—Third Party.—Where a suit was brought in a foreign court to compel specific performance of a contract by plaintiff to purchase certain land, a judgment against plaintiff did not authorize a bank in which part of the price was deposited, and which to the rights of the mortgagee whose mortgage he had paid, as against a prior judgment of which he was ignorant.—Peagler v. Davis, Ga., 84 S. E. 59.

108. **Sunday**—Reception of Verdict.—It is not unlawful to receive a verdict and impose sentence after midnight on Saturday and before sunrise of Sunday.—Barnes v. State, Fla., 67 So. 131.

109. **Taxation**—Constitutionality.—Act March 31, 1914 (P. L. p. 141), providing that taxation of bank stock, held not to violate the uniform rule of the Constitution because it imposes on the true value of the property a uniform rate. —Commercial Trust Co. of New Jersey v. Hudson County Board of Taxation, N. J., 62 Atl. 799.

110. **Telegraphs and Telephones**—Notice.—Where plaintiff was sick and telegraphed for a conveyance, a statement to him by defendant's agent an hour thereafter that the telegram had been delivered held admissible on the issue of notice of the importance of the message.—Young v. Western Union Telegraph Co., N. C., 84 S. E. 45.

111. **Tenancy in Common**—Adverse Possession.—One cotenant does not acquire the interests of the others by adverse possession, in the absence of a showing that he repudiated the cotenancy or ousted the other tenants therefrom. —Watson v. Vinson, Miss., 67 So. 61.

112. **Trade-Marks and Trade-Names**—Unfair Competition.—A person may seek a competitor's business, and tell the trade not to buy of his competitor, so long as he indulges in no harassing methods.—Victor Talking Mach. Co. v. Lucker, Minn., 150 N. W. 790.

113. **Trial**—Instructions.—An instruction, in an action for injuries to a traveler in a collision with a street car, held not to charge that plaintiff was guilty of contributory negligence as a matter of law.—Bain v. Ft. Smith Light & Traction Co., Ark., 172 S. W. 843.

114. **Trusts**—Election of Remedy.—Where a contract creates a trust, and plaintiff is entitled to have same executed by the trustee's turning over to him for life the corpus as a trust estate to be safely guarded, held, that he should institute appropriate proceedings, and not sue on the entire contract, and at the same time ask for a money judgment.—Rounsaville v. Rounsaville, Ga., 84 S. E. 64.

115.——Parol Evidence.—Where a testator has formed an intention that a legacy shall be disposed of by the legatee in a manner communicated to the legatee and assented to by him at or before or possibly subsequent, to the will, the court will allow the trust to be proved by the legatee or other parol evidence.—People v. Schaefer, Ill., 107 N. E. 617.

116. **Vendor and Purchaser**—Constructive Notice.—A person acquiring title to land with constructive notice of the actual possession of the land by one other than the vendor or judgment debtor takes subject to such rights of the occupant as a proper inquiry would have disclosed. —Carolina Portland Cement Co. v. Roper, Fla., 67 So. 115.

117. **Wills** — Cross-Remainders. — Cross-remainders are remainders limited after particular estates to two or more persons in several parcels of land, or in several undivided shares in the same parcel of land, so that, on the determination of the particular estates in any of the several parcels or undivided shares, they remain over to the other grantees, and the reversioner or ulterior remainderman is not let in till the determination of all the particular estates.—Addicks v. Addicks, Ill., 107 N. E. 580.

118.——Devise.—A devise of part of the resi-

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PUBLIC INTEREST JUSTIFYING CONFISCATORY RATES AS TO PARTICULAR COMMODITIES.

The Supreme Court of North Dakota sustained as non-confiscatory a rate for the carriage of lignite coal where the court found as a fact that: "Its (carrier's) total receipts amount to more than its actual out-of-pocket costs or actual costs of transportation, but are from $9,000 to $12,000 less than the total costs, including fixed and overhead expenses, properly chargeable to the carriage of this commodity and against the earnings therefrom. That the carriage of lignite coal by the Soo line within this state during said fiscal year was not only non-profitable, but occasioned a loss to it when its fixed expenses apportionable to all traffic are in proper proportion and amount assigned to and charged against the earnings from this commodity."

The theory of the state court was that where a rate on a single commodity is attacked it is necessary to show that the loss thereby so "reduces the balance of intrastate freight earnings," that they fail to yield the compensation a carrier is entitled to earn. This principle the U. S. Supreme Court declares to be unsound, and the decision of North Dakota Supreme Court is reversed. Northern P. R. Co. v. North Dakota, 35 Sup. Ct. 429.

This reversing decision, while conceding something of discretion to state courts to fix rates, admits a presumption of reasonableness in their favor, yet declares that "the state may not set apart a commodity or a special class of traffic, and impose upon

it to haul one class of goods for nothing or for less than a reasonable rate."

The theory thus announced appears several times to have been declared by the Supreme Court, but the contention was made in the case at bar, that there was discretion exercised by the state commission "to aid in the development of a local industry and thus to confer a benefit upon the people of the state."

But the federal court said that: "While local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the state may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously in order to build up a local enterprise."

There is the general principle that no public purpose will justify a state refusing to permit a common carrier to earn from its service compensation that is fair and reasonable. But, as such carrier is under state control, may not the state distribute rates so as to make some of them compensatory and others non-compensatory, provided that upon the entire earnings the carrier reaps reasonable compensation, and provided further that the state has a definite public interest to subserve.

If the carrier complains of a rate as to a particular commodity, has the state no right to answer that it is equalized by another rate or by the earnings generally? The court says: "If other rates are exorbitant they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low."

Were rate-making like statute-making, this reasoning would seem more obvious into existence, to become compensatory tomorrow and then it will bring more traffic as to commodities already yielding compensatory rates. The carrier is only theoretically, and not actually, harmed by this view of compensatory rates.

It does *not* seem to us that it "certainly" is true that one customer may not be charged an excessive rate in order that the general interest may be benefited in charging lower rates to another. The individual right to have carriage at a reasonable rate is not an absolute, but a relative, right. It is accorded to him as a member of society and is subject, therefore, to what may be the general welfare. The carrier's obligation to haul for a reasonable rate is the precise correlative of the individual right. And what boots it to the carrier if the general result is the same? This decision was dissented from by Mr. Justice Pitney without opinion.

Of course, it might be thought, that merely administrative boards could not be vested with power to declare the kind of public policy this kind of rate-making involves. It even might be doubtful whether a legislature specifically could bestow it. We think, however, it could specifically grant this to a commission. And when as to overhead expense of every kind, all rates are to be judged as or not compensatory, there is such relation of the parts to the whole, that a law vesting an administrative board with discretionary powers should not be deemed to care for other than general results. If these work out well, no carrier ought to have the right, as a servant of the public, to complain. And this servant, whose rights are sedulously guarded in a general way, ought to be made to yield in all particular ways, where its general rights are not affected.

We will say, in conclusion, that we do not greatly fancy such an expression as "local interests serve as a motive for enforcing reasonable rates." The motive is one of command of the law. Reasonable rates must be enforced, because they are the right of the carrier and also the right of the shipper, but as we have said, these rights are relative and not absolute.

NOTES OF IMPORTANT DECISIONS

HABEAS CORPUS—DOMINATION BY MOB TAKING AWAY JURISDICTION OF A COURT.—In Frank v. Mangum, 35 Sup. Ct. —, the only question upon which there was any dissenting view was upon the force to be given to allegations in a petition for a writ of habeas corpus showing that a mob spirit so overrode due process in a trial as to deprive it of being such.

In the majority opinion, Mr. Justice Pitney says: "The petition contains a narrative of disorder, hostile manifestations and uproar, which if it stood alone and were to be taken as true, may be conceded to show an environment inconsistent with a fair trial and an impartial verdict."

He goes on then to argue that the allegations in the petition had been passed on by the state courts adversely to petitioner for habeas corpus and "no doubt is suggested that the (State) Supreme Court had full jurisdiction to determine the matters of fact and the questions of law arising out of this alleged disorder."

It is, however, said the federal courts are not bound by the state courts' finding in such a question, "but this does not mean that the decision (of the state courts) may be ignored or disregarded." It is said, however, to be the right of federal courts "to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law and for this purpose to inquire into jurisdictional facts."

Mr. Justice Holmes, with whom concurred Mr. Justice Hughes, thought that: "The fact

It seems to us that the only thing that persuaded the majority to deny the writ in this case was that the state courts had passed on the question of the fact, and yet it is admitted their findings are not conclusive.

If Frank had not made any contention of mob domination before the state courts, it likely would have been held he waived the point, and if he made the point and was overruled the overruling would have great weight in rebutting his recital of facts in his petition to be true. Therefore it seems to us that it is practically impossible for one deprived of a fair trial and subjected to a trial which was no trial at all, successfully to invoke habeas corpus upon such a ground.

We rather agree with Mr. Justice Holmes, that it is proper in determining the law upon such a subject to invoke an extreme case as a test. In a question of fact under the Fourteenth Amendment the opinion of judges of a court is not more to be respected than the opinion of others, and the majority agree that it is far from conclusive. It may be right to give every presumption to state courts' recitals of the facts in every case, but that is as far as the federal court ought to go.

ACCIDENT INSURANCE—PTOMAINE POISONING AS COVERED BY.—The question whether a general clause in a policy against death by accident covers poison from the taking of impure food into the stomach is somewhat akin to the question of responsibility of an innkeeper for damages from the eating of impure food served by him to a guest. The similitude lies in the fact of the impure food being the proximate cause of death. We treated this question in 79 Cent. L. J. 201. Or more nearly it resembles a case annotated by us of an unexpected result from an intended act as being an accident. 79 Cent. L. J. 411.

Michigan Supreme Court holds that death from ptomaine poisoning comes within the ordinary clause of an insurance policy against accident. Johnson v. Fidelity & Casualty Co., 151 N. W. 593.

The court does not go into any such refinement as above spoken of, but says it is the same as "if the assured by mistake had taken carbolic acid when he intended to take a helpful medicine." This being so, it asks: "Why then should it be said there is no liability when the assured intending to take nourishing food, in fact took tainted food which resulted in pto

be thought applicable the thought of unexpected result from an intended act in the taking of carbolic acid. But one does intend to take food when he partakes of poisoned food. His taste and judgment approve what he is doing, which is not the case when he swallows carbolic acid. There is mistake in both cases, but the mistake in the former case is not like that in the latter. Judgment is involved and an insurance company is hardly supposed to guaranty the reasonable exercise of one's judgment, or that one shall not err in his judgment.

SALES—TITLE DERIVED BY BONA FIDE PURCHASER FROM ONE WITHOUT TITLE. —It is held in Norris v. Boston Music Co., 151 N. W. 971, decided by Minnesota Supreme Court, that one cannot get good title from a factor when goods are disposed of not in the ordinary course of trade, nor can one who acquires possession in this way pass a good title to a bona fide purchaser.

The court says that: "This is true because one who purchases from a factor in consideration of a pre-existing debt, or in part consideration of a pre-existing debt and barter or exchange, acquires no title, and having no title can pass none."

We think this cannot be law, because the second seller has by fraud of owner's rights been invested with indicia of ownership as to all innocent purchasers from him. The factor violates presumptively to the knowledge of the purchaser from him the bailment to him, and, of course, the title does not come to him apparently fair. But the situation of the second purchaser is not the same. There is legal fraud by the first purchaser and where a vendor obtains goods by fraud a purchaser in good faith from him will be protected. Phelps v. McQuade, 143 N. Y. Supp. 822, 158 N. Y. App. Div. 528. Where an owner puts in another's possession evidence of the right to sell, a sale to a bona fide purchaser passes title. Brewing Co. v. Mantz, 120 Md. 176, 87 Atl. 814. If one trusts a factor, who disobeys instructions, does the factor's delinquency fall on one who has nothing to do with such delinquency?

It has been ruled that a buyer for cash who obtains possession without payment may pass title to another even in consideration of a pre-existing debt. Patchin v. Rowell, 86 Conn. 372, 85 Atl. 511.

It seems to us that legal fraud should operate in the same way as actual fraud, and when one

THE REVIVAL OF NATURAL LAW.

Now and then we are told that a revival of the Law of Nature is in process or impending. No doubt these assertions would not be so readily advanced, by intelligent observers, if they were not warranted, in part at least, by the facts.

A new movement of this character, of any considerable dimensions, can scarcely be said to be yet in-sight in the United States. We inherit much of the traditional attitude of English-speaking peoples towards metaphysical speculation; we are by temperament a strongly realistic people.

We read in Holdsworth:

"In the same years as that in which the Statute of Uses was passed all the judges agreed that 'the common law is but common reason, and common reason bids one trust another, and a Use is a trust between feoffor and feofee; which trust is by common reason, and common reason is common law; and therefore it follows that the Use is at common law.' But this was hardly the view of the lawyers of Edward IV's reign."

Nor has it, in general, been the view of English lawyers since that time.

Another quaint statement that we find in Holdsworth might apply nearly as well to England in the twentieth century as to England in the thirteenth: "In Anglia minus curatur de jure naturali quam in aliqua regione de mundo." (History of English Law, ii, 512.)

Nevertheless, in a notice of Professor Vinogradoff's "Common Sense in Law," published a few months ago in the *Juridical Review,* one comes upon this statement regarding the author of that highly instructive book: "He reflects the present rehabilitation of the Law of Nature, not indeed as a code directly bearing on the practice of courts, but as a conception wielding indirectly a powerful and persistent influence ment may need to be discounted as applicable to English conditions, though it may well describe a movement on the Continent.

In Vinogradoff's book we find no specific recognition of a revival of natural law in England, though there are vague references to "the spread of doctrine claiming to pronounce judgment on positive law for the sake of justice." This writer appears to have a general tendency in mind rather than one which can be assigned to a particular locality.

He says this revival of appeals to the Law of Nature comes from two sides. One of these attitudes is that of those people who aim at a transformation of existing systems of law to bring them more directly into touch with the fundamental requirements of modern society; in this case the Law of Nature is intimately connected with a program of social reform, though not necessarily with a socialistic program. The other attitude, more modest, is that of those theorists who, headed by Stammler, contend that every age must have its own Law of Nature deducible by philosophical doctrine. In the latter case the Law of Nature is not so much a means of vindicating social reform, though it may incidentally serve that purpose, as it is a moral standard by which to test the adequacy of positive law.

In spite of these interesting observations, it is manifestly difficult to point to any conspicuous modern representatives of a clearly defined doctrine of natural law. The Law of Nature which Stammler is himself supposed to advocate is a highly intangible and uncertain entity, a method of criticism rather than a system of distinct rules; indeed he seems to believe that the formulation of a definite system of natural law would be a vain undertaking. And when we look elsewhere on the Continent for a typical doctrine of natural law, while it is true that we may find, here or there, some

In this country, in a land of so many diverse intellectual tendencies, we are likely to witness isolated attempts to formulate a doctrine of rational law, and European speculation cannot fail to have a degree of influence on this side of the Atlantic. For the most part, however—and this statement is particularly applicable to those who make and administer our law—we are unlikely to recognize any Law of Nature except so far as it may be synonymous with ordinary social justice and expediency, and except so far as it may be implied in any utilitarian or Pragmatistic social philosophy that aims to bring positive law into closer harmony with the needs of society. When the attempt is made to correct fundamental defects of positive law and to overthrow established dogmas underlying our legal system, appeal is likely to be made not to a metaphysical doctrine, but to concrete facts of social life. Thus the term "natural law" seems far less likely to mark a specific theory than a general tendency in American jurisprudence. A. W. SPENCER.

Brookline, Mass.

EXPLOSIONS—BLASTING AS NUISANCE.

ALLEGHENY COKE CO. v. MASSEY.

Court of Appeals of Kentucky. March 26, 1915.

174 S. W. 499.

Though a person injured by a blast while not on his own property must show either that the blasting was negligent or was carried on in a thickly populated community, one doing blasting is liable for injuries received by plaintiff who was in his own dwelling house, the casting of stones in such case upon the dwelling house of plaintiff being a trespass and a nuisance, notwithstanding care was used to prevent injury.

CLAY, C. Carl Massey, an infant, suing by his father and next friend, George Massey, brought this action against the Allegheny Coke Facts are these: Defendant was preparing to erect a coal tipple at its plant in the town of Hellier in Pike county. It became necessary to break some stone by means of blasting. About 100 yards from where the blasting was being carried on were three houses. These houses belonged to the company. One of them was occupied by George Massey and his family. At the time of the injury some five or six shots were fired altogether. All of them were "doby" shots with the exception of one, which was a seam shot. Just prior to the firing of these shots the usual warning of "fire" was given. When this warning was given Mrs. Massey and her son Carl Massey, a boy four years of age, were in the yard. They immediately ran into the house. Mrs. Massey remained in the kitchen. Carl went into the front room and stood by the window looking at the blast. A small rock was thrown by one of the blasts through the window where the child was standing, a distance of 109 yards. The rock struck the child on the head, knocking out one of his eyes and disfiguring his face.

In his original petition, plaintiff charged that the blasting was negligently done. In his amended petition, he alleged that the blasting was being done within the corporate limits of the town of Hellier and within a very short distance of a large number of dwelling houses which were occupied by men, women and children, and that the blasting in such close proximity to the dwelling houses, and the throwing of the stone into the dwelling house occupied by the plaintiff constituted a nuisance.

The court told the jury, in substance, to find for the plaintiff if it believed that the defendants, while engaged in blasting for a tipple foundation, threw a rock into the dwelling house of George Massey and injured plaintiff.

(1-3) It is a rule in this state that where the blasting operations result in a direct trespass upon the premises injured by casting soil or rocks thereon, the liability of the person causing the injury is absolute, and it must respond in damages irrespective of the question of negligence or want of skill. The reason for the rule is, that unless a party can show a right, either in the nature of a presumed grant or easement, or in some other mode, to use his property in a particular way, he cannot use it in that particular way if it occasions injury to his neighbors, in the quiet enjoyment of their legal

v. Bay, 3 Md. 431. Indeed the ancient rule of the common law, that he who throws substances on the land of another is liable in damages, is generally sustained in cases where by blasting, rocks, earth, or other substances are cast upon the land or buildings of another. Bessemer Coal, Iron & Land Co. v. Doak, 152 Ala. 166, 44 So. 627, 12 L. R. A. (N. S.) 389; Georgetown, B. & L. R. Co. v. Eagles, 9 Colo. 544, 13 Pac. 696; Langshorne v. Wilson, 91 S. W. 254, 28 Ky. Law Rep. 1181; Tremain v. Cohoes Co., 2 N. Y. 163, 51 Am. Dec. 284; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Page v. Dempsey, 184 N. Y. 245, 77 N. E. 9; Kratzer v. Saratoga Springs, 40 N. Y. Supp. 474, affirmed in 158 N. Y. 736, 53 N. E. 1127; Henry Hall Sons' Co. v. Sundstrom & S. Co., 138 App. Div. 548, 123 N. Y. Supp. 390; Carman v. Steubenville & I. R. Co., 4 Ohio St. 399; Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408; 2 Mor. Min. Rep. 194.

Defendant insists that the above rule is based upon the sanctity which the ancient common law attached to the ownership and occupancy of real property, and especially to the sanctity which that law attached to one's dwelling house, which was deemed to be his castle, and does not apply to personal injuries unless the blasting is done in a situation where it is necessarily dangerous to the public, as in a thickly settled portion of a city. Thompson on Negligence, § 764. In other words, defendant's position is that unless the blasting be done in a thickly populated city, no liability for personal injuries arise unless there is negligence, as, for example, where care has not been taken to warn persons in the vicinity that the blast is about to be fired, in order that they might seek places of safety. As the accident did not happen in a thickly populated portion of the city and as ample warning of the blast was given, it is argued that the court not only erred in authorizing a recovery in the absence of negligence, but also erred in refusing a peremptory instruction in favor of defendant.

It is doubtless true that where a person is not injured in his own home, to which he has the right to go for protection, but is injured outside of his home he must show either one of two things: That the blasting was being carried on in a thickly populated portion of the city (Munro v. Pacific Coast, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248), or, if elsewhere, that there was a failure to give reason-

was done in such close proximity to plaintiff's residence and other adjoining residences with knowledge of the fact that these residences were occupied, that a rock from one of the blasts was thrown into plaintiff's residence and caused the injury. The fact that plaintiff's father was an employe of the coke company and rented the premises in question in no way affects the case. It was plaintiff's home, and his rights are the same as if the property had been owned by his father. As we view it, the sanctity with which the common law invests one's home is not confined merely to the property itself. We are not, therefore, disposed to take the narrow view that for trespass resulting in injuries to one's property a recovery can be had, but no liability attaches where the trespass results in injury to one's person.

In the case of Louisville Railway Co. v. Sweeney, 157 Ky. 620, 163 S. W. 739, a street car operated by the defendant left the track near plaintiff's house. The car struck a telephone pole, which fell and struck a gate. The gate was thrown against plaintiff and injured her. Though the case was one involving injury to the person, the court applied the rule applicable to trespasses on property. In discussing the question the court said:

"The plaintiff as the owner of her property was entitled to the undisputed possession of it. The entry of the defendant upon it either by its street car or by the pole which it set in motion was a trespass. One who trespasses upon another and inflicts an injury is liable for the injury, unless caused by the act of God or produced by causes beyond his control. We have held that one who in blasting throws rock or other debris upon the land of another is liable for injury done, irrespective of whether the blasting was negligently done or not, as there is in such a case an actual invasion of another's premises and the act itself is a nuisance. The same principle has been applied to the polution of air or the abstraction of any portion of the soil, or the casting of anything upon the land in other ways. Langhorne v. Turman, 141 Ky. 809 (133 S. W. 1008, 34 L. R. A: [N. S.] 211) Langhorne v. Wilson, 91 S. W. 254. The same principle must apply here."

The question of contributory negligence is eliminated from the case by the fact that plaintiff was an infant only four years of age and could not, therefore, be guilty of contribu-

plaintiff. Louisville & Nashville R. R. Co. v. Wilkins, Guardian, 143 Ky. 572, 136 S. W. 1023, Ann. Cas. 1912D, 518; South Covington & Cincinnati St. Ry. Co. v. Herrklotz, Ry., etc., 104 Ky. 400, 47 S. W. 265, 20 Ky. Law Rep. 750.

When the warning of the blast was given the mother and child had the right to seek the protection of their own home. While there they had the right to be secure not only in their property but in their person. Defendant's act in causing the rock to be thrown into plaintiff's home and causing the injury was a direct trespass and therefore a nuisance. It follows that it was not necessary to show negligence in order to render defendant liable. The trial court therefore did not err in so instructing the jury, or in refusing the peremptory instruction asked by the defendant.

Judgment affirmed.

Note.—*Distinction as to Blasting Causing Concussion and Blasting Causing Trespass.*—We think that the rule announced by the instant case, viz.: that blasting causing rocks to fall on another's premises constitutes a nuisance for which damages are recoverable without respect to the prosecution of work being carefully or negligently performed is supported by practically universal authority. But where damages are caused by concussion or shaking there appear to be two lines of cases.

An excellent case taking the view that concussion and injury from vibration to buildings stands the same as blasting causing rocks to fall thereon is that of Hickey v. McCabe, R. I., 75 Atl. 404, 27 L. R. A. (N. S.) 425. This case points to what it calls the "sharp and irreconcilable conflict of authority" on this question. After tracing the doctrine declared by New York Court of Appeals requiring proof of negligence in a concussion case, the Hickey case declares that: "The point has apparently seldom come before the courts; but in a number of well-considered cases in different states, a rule contrary to that adopted by the New York court has been laid down." Then are cited Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556; Fitz Simons, etc., Co. v. Braun, 94 Ill. App. 533, affirmed in 199 Ill. 390, 59 L. R. A. 421, 65 N. E. 249; Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221; Gossett v. Southern R. Co., 115 Tenn. 376, 1 L. R. A. (N. S.) 97, 89 S. W. 737, 112 Am. St. Rep. 846.

The Hickey case then says: "We see no valid reason why recovery should be permitted for damage done by stones or dirt thrown upon one's land, and denied for damage done to the same land by vibration. That the blasting it causes stones or other *debris* to be thrown upon the land in one case, and in the other only operates by vibrations or concussions through the earth or air, seems to us to be immaterial."

The court thought that the fact that "trespass" might not lie in the latter case was immaterial.

The Colton case, *supra,* spoke of the destruction or injury being "the natural and proximate result of the blasting. The defendant seems, by his contention, to claim that he has the right to blast rocks with gunpowder on his own lot . . . even if he had shaken Mrs. Colton's house to ruins, providing he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be necessary, probable or natural consequence. But in this he is mistaken."

In the Braun case it was said: "It would seem absurd that any refinement of reasoning as to nuisance *per se* or as to injury consequential or by physical invasion, should be permitted to obstruct the natural justice of a rule which would make one who chooses, for his own convenience or profit, to use agencies, which, in their probable or natural results, will injure the property of others answerable for the loss occasioned by such injuries."

There also may be cited on this side of the question a *per curiam* opinion in Hess v. Am. Pipe Mfg. Co., 221 Pa. 67, 70 Atl. 249, where plaintiff was thrown from a chair by concussion from a heavy blast.

As stated above, the opposite doctrine has been declared by New York court, and in Bessemer C. I. & L. Co. v. Doak, 152 Ala. 166, 44 So. 627, 12 L. R. A. (N. S.) 389, it is said that: "The rule deducible from the decisions seems to be that, where a person lawfully engaged in blasting upon his own land so conducts the work as to cause damage to adjoining property, in a way in itself unlawful, as where there has been a direct trespass upon the premises injured, by casting soil or rocks thereon, the liability of the person causing the injury is absolute. * * * But for any other injury, such as may result from the mere concussion of the atmosphere, sound, or otherwise, there is no liability, unless it is shown that the work was done negligently and that the injury was the result of blasting according to the usual methods and with reasonable care." For this is cited Booth v. Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 492, 24 L. R. A. 105, 37 Am. St. Rep. 552 and other N. Y. cases.

In Thurmond v. White Lime Asso., 125 Mo. App. 73, 102 S. W. 617, the rule in the Booth case was followed, but doubt was expressed of its being made of general application. The case was decided against plaintiff upon the ground that he had assented to the work properly conducted, by leasing and selling land to defendant for quarry purposes.

REVIEW OF CURRENT PERIODICAL LITERATURE OF INTEREST TO LAWYERS.

(Edited by A. H. R.)

Biography. Life of John Chipman Gray. By Ezra Ripley Thayer et al. 28 Harvard Law Review, p. 539 (April).

This article is an appreciation of the life of John Chipman Gray, Royal Professor Emeritus of the Harvard Law School, by Ezra Ripley Thayer, Samuel Williston and Joseph H. Beale, three of his colleagues in the Law School. The writers call attention to the fact that no author of the present generation stands higher in the estimation of law students than did Mr. Gray, whose work on the "Rule Against Perpetuities" reached three editions, and is considered the highest authority on that subject. His "Cases on Property," in six volumes, is also used as the basis of instructions on the subject of real and personal property in the leading law schools of the country. He was a scholar of very high attainments and, as Mr. Thayer says, "the classic training that enabled him to handle his Greek so lightly, no doubt had much to do with the terse elegance of his diction." On the other hand, he was a man who despised sham or pretense in any form, was very democratic in his ways and, "his intellectual honesty matched the soundness of his moral fiber." His wonderful success as a teacher is properly attributed to the fact that he never tried to show off before his students, or to let them know how smart he was, but he regarded his students as fellow searchers after the truth, "trying to get to the bottom of every difficult subject."

Comity. "Comity in the Federal Courts." By Arthur March Brown. 28 Harvard Law Review, p. 589 (April).

The author cites and discusses a large number of federal decisions showing the extent to which the federal courts recognize the decisions of each other and of the separate states. He shows that there has been a distinct effort on the part of the federal courts to reach a uniformity of decisions, especially in patent cases, although the result has not always been uniform. He shows that in quite a number of recent cases there has been a tendency to assert an independence which has not failed to create confusion. The author calls attention especially to the cases under the Tariff Act, where, as the author says, "the confusion which would be produced in the collection of customs duties rules in certain parts of the country is so obvious," but he believes that since judges have shown a desire to make the decisions of the federal courts uniform, that there is much to be hoped for. The author says that it may be trusted, as time goes on, that the Courts straint at all, but of a national comity of order and consistency, dictated by sound principles of public policy.

Constitutional Law. "The Constitutional Right to Keep and Bear Arms." By Lucilius A. Emery. 28 Harvard Law Review, p. 473 (March).

This is a short article investigating historically the origin of the right of citizens to keep and bear arms. The author shows that as early as the second year of the reign of Edward III this right was limited by the Statute of Northampton which prohibited any man from riding armed "by night or by day in fairs, markets, nor in the presence of the justices." Historically, the author shows that the right to keep and bear arms was not regarded as a fundamental right of every Englishman. The origin of constitutional provision in this country making inviolable the right to bear arms arose, according to the author, in the custom of the early citizens to provide arms for the common defense against the savages, and in reliance on citizen soldiery or militia as against a standing army. The author quotes the language of the federal Bill of Rights to the effect that, "A well regulated militia being necessary for the security of a free state, the right of the people to keep and bear arms shall not be infringed," and concludes that this preamble in the federal provision indicates the extent of the right as well as its origin. From these premises the author argues that constitutionally the right of the individual to bear arms may be severely restricted or even prohibited absolutely except when carried for the common defense of society, or of their homes. On this point the author says, "I submit that the right guaranteed is not so much to the individual for his private quarrels or feuds as to the people collectively for the common defense against the common enemy, foreign or domestic. The guaranty is to insure the safety of the people, their 'laws and liberties,' against assaults from any source or quarter, but not to give individuals singly or in groups uncontrollable means of aggression upon the rights of others," and even the right to carry weapons for personal defense may be prohibited to the extent of requiring that the person so carrying such weapons shall first show that he believes and has reason to believe that it is necessary for his defense under any particular circumstance.

Corporations. "Shareholder's Liability to Trustee in Bankruptcy." By A. D. Lipscomb, Beaumont, Texas. 49 American Law Review, p. 171 (March-April).

The author in this article discusses the question of whether the legal obligation of shareholders to pay for their shares in a corporation may be enforced by proper representatives creditors, and also notwithstanding there may be a contract between the corporation and the shareholders that such stock shall be regarded as fully paid or non-assessable, such contract the author declaring to be a conspiracy on the part of the shareholders and the corporation to avoid their legal obligations.

Custom. "The Growth of Custom Into Law." By L. Dee Mallonee, of the University of Wisconsin. 49 American Law Review, p. 249 (March-April).

The author discusses very interestingly the subject of custom as it grows into law. He reaches the conclusion that heretofore the law has almost been made wholly by custom, but that to-day the influence of custom in shaping law is not so great since year by year legislation encroaches upon the place formerly occupied by custom. In other words, people are not ready to wait for the slow process by which custom becomes law, but when they are in favor of a change they make it at once by legislative enactment. Nevertheless custom, to some extent, is even to-day shaping the law and it is by no means an unimportant element of the law. It may even be said to enter the law today by way of the legislature than by way of the courts.

Divorce. "Ex Parte Divorce." By Robert J. Peaslee, of Manchester, N. H. 28 Harvard Law Review, p. 457 (March).

This is a very exhaustive and learned discussion of the celebrated case of Haddock v. Haddock which the author concludes has only muddied the water with respect to a solution of the problem of the locus of the matrimonial domicil. The author states that the Supreme Court of the United States has taken quite a number of inconsistent positions on the question of the res in divorce cases. Beginning with the case of Maynard v. Hill, 125 U. S. 190, where the rule was laid down that a legislative divorce by the Territory of Oregon concluded property rights of both parties to the marriage, although one of them was a non-resident of the territory. The difficulty, the author conceives, is in determining the matrimonial domicil. For, if that is determined it is well recognized that the status of the parties is located at that domicil and that no other court has jurisdiction to dissolve it. The author takes issue with the statement so often found in opinions of the courts that each state has control of the status of its citizens on the ground that the status of marriage is a correlative status. On this point the author says, "It is the merest quibble to assert that the state deals with the status of its own citizen only and leaves that of the non-resident untouched. As well say to a Siamese twin: 'I only sever you from your brother; but, you

The author then discusses the question as to the matrimonial domicil on desertion of either spouse. The author denies that the husband as dignior persona has a right to desert the wife and fix the matrimonial domicil. He also argues that the wife, when driven from the home of the husband by reasón of his cruelty, may fix the matrimonial domicil at the place to which she retreats and that the matrimonial domicil does not remain with the husband in such case, as was held in the Atherton case. The author finally propounds the following rule for determining the res of the matrimonial domicil, to-wit: "It is that place where one spouse is rightfully domiciled and where the other ought to be to fulfill the marital obligations."

The author concludes that the decision in the Haddock case is unsatisfactory in permitting a decree of divorce, granted by the courts of one state based on the mere residence of the plaintiff, to be good or not in other states, as such states may wish to regard such judgment. Such judgments, the author concludes, should be good in every state and entitled to full faith and credit when based upon the jurisdictional fact that the state decreeing the divorce has jurisdiction over the matrimonial domicil. The author formulates the following rule in determining jurisdiction: jurisdiction "ordinarily rests in the state where the husband and wife both reside. If they live in different states, it is prima facie in the state of the husband's domicil, since it is his right to fix the family home. But as the right is forfeited by his misconduct, it may be at the wife's domicil. Thus the question of the misconduct of either spouse becomes jurisdictional. It may be subsequently tried out in the state which theretofore assumed jurisdiction to grant a divorce as well as in any other, and the divorce will be valid everywhere, according as the jurisdictional facts are determined in a proceeding in any court having jurisdiction of both parties."

Health. "The Power of a Board of Health to Regulate the Discharge of Municipal Sewage Into a Watercourse." By George M. Hogan, St. Albans, Vt. 49 American Law Review, p. 217 (March-April.)

The author discusses the subject principally from the standpoint of the Vermont decisions. He takes the position that the right of a board of health, while statutory in its jurisdiction, nevertheless rests its power to protect the health upon that function of government known as police power and that therefore it is error to say that a board of health derives any authority in this connection wholly from the statute. The author begins by laying down a presumption which he regards as rebuttable, however, that the discharge of sewage into a watercourse used as a source of water supply constitutes what is known in law as a public nuisance. He shows that the subject of pollution of waters should make use of, and also such proceedings which a board of health may take in lawfully abating the nuisance. The author then refers to decisions in other states, showing a long list of authorities holding that the discharge of sewage of a municipality into a watercourse is an unreasonable use to make of the water and renders the municipality liable. The right exists on three grounds: first, that every riparian proprietor is entitled to the right to have the watercourse flowing by his lands in an unpolluted condition; second, that while a municipal corporation may construct a system of sewerage and make a reservoir its outlet, yet if pollution arises through construction or unreasonable use the municipality is liable on the theory that the authority of the legislature to construct a sewerage system is not a warrant for maintaining a nuisance; third, the fact that other parties contribute to the pollution of the water supply does not afford a ground for defense by the municipality.

International Law. "International Anarchy and International Law." By Archibald R. Watson. 9 Bench and Bar, p. 477 (March).

The author takes the position that international law, lacking a sanction or authority for the visitation of punishment, is not law at all and should not be so dignified. "Individual units of society," says the author, "have developed known codes of law, but collective units—nations and states—are still as lawless as their ancient prototypes, the prehistoric tribes, so far as there is any recognition of authority save the authority of force." The author regards international law, at its best, as nothing more than a system of etiquette enforced by the polite society of nations, which one nation would not care to disregard except in order to reach some important result. The author reaches the conclusion that civilization has not arrived, that so far as nations are concerned we are still living in a primitive condition, and that internation anarchy is the result. He therefore believes that it is useless to attempt to fix the blame of the present war upon any one nation, on the ground that there is no law binding nations except with their consent and that the construction which each nation puts upon the rules of international law is necessarily final. "Under a barbaric world system," says the author, "recognizing, in its last analysis, no law but the law of might, nations are right to arm, right to fight. In a state of anarchy, if one armed individual threatens the life of another one, when they meet they fight. In the same way, when one nation is profoundly convinced that war with another nation is inevitable, it has a right to strike, and strike first." The author pleads for a sanction for international law different from that of the United States and that decisions of our federal Supreme Court are not received as having any knowledge of conditions existing between the various provinces of the Dominion of Canada with the federal government. In the first place the author shows that there is no realm of protection to individual or property rights in the British North America Act which takes the place of our Constitution. In other words, Canadian legislatures are omnipotent within their respective spheres. Another distinction is the right of the federal government to veto provincial legislation, which serves as a more effective check than our Constitution on the use of provincial authority. The third distinction is in the provision that powers not specifically granted to the provinces are reserved to the federal government, while just the opposite rule obtains in this country. In other words, the provinces of the Dominion of Canada have no lawmaking powers except those expressly given them by the British North America Act. These distinctions render judicial control over legislation in Canada far different from that exercised in the United States. It is of course true that the courts of the provinces not only decide as to the competence of provincial legislatures to enact certain measures and also place their stamp of disapproval on Dominion acts which are regarded as beyond federal jurisdiction, but this power is always exercised with more caution than in the United States, according to the author, and he cites many decisions to support his contention. The final court of last resort on such questions is the Privy Council, to which court cases may be carried direct from the provinces or from the decision of the highest court of Canada.

Libel. "Presumptions and Burden of Proof as to Malice in Criminal Libel." By Theodore Schroeder, New York City. 49 American Law Review, p. 199 (March-April).

The author opens his discussion of this question with the statement that the relation of malice to liability for libel is a subject upon which the courts are in hopeless confusion so far as the report of decisions are concerned. The author then proceeds to "ignore" the existence of authorities, and endeavors to reach a "clear understanding of the natural factors of the problem." He discusses, under various subject headings, the old theory of libel prosecutions, how old theory was made effective, freedom of the press and the new justification, making such new theory effective, the nature of malice, whether malice is always actual malice, results attainable under recent statutes and malicious defamation and innocence.

come a part of his prospective treatise on Sociological Jurisprudence. The author shows that personal honor and reputation is as fundamental and as inviolable a right of a person as that which attaches to the defense of the physical person and it is to the interest of society to secure that right by the most effective means. The author states that while the right is not strictly a property right that nevertheless for practical purposes the law recognizes it as "essentially one of substance." The author, however, does not think that the law properly secures this right by regarding it as a matter of substance only. "If," says Prof. Pound, "securing the individual in his interest in maintaining his dignity and his honor, as parts of his personality quite as dear to him as the integrity of his skin, is dependent on the possibility of pecuniary assessment, it must be because of some inherent difficulty in securing such an interest legally, and not because the interest itself is essentially one of substance." The author quotes the German code as making distinction between injuries which are purely to the honor of a person and those which, when made, are likely to injure the credit of the complainer or his earning power. In the first case the remedy is a sum of money fixed as a penalty, and liability accrües only in case of intentional insult or intentional defamation. In the other case the wrong doer is liable for any statement which is likely to injure the credit of the complainer or his earning power, and in such case remedy is reparation for the actual pecuniary loss. This distinction, the author argues, follows the property line of demarcation between an interest in the personality as in the former case, and an interest of substance in the latter case.

The author objects to the attempt of modern law to reach a definite measure of actual money compensation for an injury purely to the honor or dignity of the person injured, arguing that it is impossible in such cases to limit the recovery to actual damages, as such an injury is not a matter of substance, although the attempt, the author conceives, grows out of the exigencies of trial by jury, and he observes, "the margin of discretion in the jury in assessing damages in such cases hides the breakdown of the academic rules as to the measure of damage which are laid down in the charge of the court." In conclusion, the author argues for an extension of preventive remedies to secure interests of personality to a greater extent than are allowable to date.

Lis Pendens. "Lis Pendens as Notice." By Adolph T. Sieker. 9 Bench and Bar, p. 483 (March).

The author discusses the theory announced by Chancellor Kent, that there can be a lis

raised a presumption of abandonment. The author seems to think that statutory enactments in England and in this country, which continue the fiction of constructive notice have not destroyed the doubts that existed at common law. He regards lis pendens as one of mere policy, confined in its operation strictly to the purposes for which it was adopted; that is, to give effect to the judgments and decrees of Courts of Justice, and that it is not properly a notice to any purpose whatsoever, hence he concludes that the effect obtained by lis pendens is not constructive but actual notice of all that the pleadings and other proceedings in the action contain. The author says that the indiscriminate filing of notice of lis pendens is the cause of much annoyance to all whose duty it is to examine titles. The author shows that the practical effect of lis pendens is the impounding of real property to await the determination of a plaintiff's claim.

Negligence. "Contractual Limitation of Liability for Negligence." By Emlin McClain, of the State University of Iowa. 28 Harvard Law Review, p. 550 (April).

The author shows that the rule respecting the proper limitation of liability for negligence has no place in the civil law, but is a rule peculiar to our system, having relation more particularly to the carriage of goods, and arising from the fact that the public carrier is absolutely liable for all loss not due to an act of God or the public enemy. The author traces the inception and growth of the idea through the English decisions and the modification of the rule in the American courts. He discusses what he calls an anomaly creeping into the law as to the limitation of a carrier's liability, to-wit: the distinction made between negligence for which it was assumed the carrier might be relieved by contract, and some kind of fault or misfeasance called gross negligence from which a contract exemption would afford him no protection. The author then discusses the difficulty of distinguishing between gross negligence and that of ordinary negligence, citing quite a number of cases. He finally reaches the conclusion that there is no general concurrence of views on the part of the courts in a broad proposition that aside from public service undertakings an antecedent contractual release from liability for negligence which has no characteristic of willful or intentional wrong is void; while the public service cases only indicate a general concurrence of view to the effect that obligations to those who are entitled to such services cannot be reduced by any such stipulation.

Oil and Gas. "The Right of a Land Owner to Oil and Gas in His Land." By John Stokes course, that one may obtain property in oil or gas by confining it in a well or tank, and then it becomes his personal property, but that until so confined the proprietor has no "right of property" in any oil or gas under his land. Oil is a fluid, according to the author, and like running water is not the subject of property except while in actual occupancy. The author quotes with approval Justice Van Devanter's declaration in Lindsley v. Gas Co., 220 U. S. 61, to the effect that "each surface owner in an oil and gas area has the exclusive right on his own land to seek the oil and gas in the reservoir beneath, but has no fixed or certain ownership of them until he reduces them to actual possession." The only discordant note to this harmony of authority cited by the author is found in cases in West Virginia and Kansas, where it has been held that oil and gas are to be considered as mineral, and being mineral should be considered a part of the realty, like coal or any other natural product, and should therefore be deeded as realty and not as a mere license or permit. The author contends that these decisions are indefensible on any ground by reason attributing ownership in a thing of which another may lawfully deprive the apparent owner. The author concludes that oil and gas are not part of the real estate and therefore cannot pass by deed as conveying a separate right of oil and gas, but that all a land owner can do is to transfer his exclusive right to explore and reduce to his possession such gas or oil as may be found in his premises. The author shows that by reason of the peculiar nature of the owner's right to oil and gas an action by ejectment would not lie in favor of the owner who had been deprived of his right.

Sociology. "Criminal Statistics and How They Should be Secured." By John Koren. 5 Journal of Criminal Law and Criminology, p. 653 (Jan.).

This article is virtually the report of the committee on criminal statistics of the Institute of Criminal Law and Criminology, presented at the meeting of the Institute, Oct. 22, 1914. It has to do with the method of securing and arrangement of the statistics of crime, secured from three sources: first, police records; second, criminal court records; third, records of penal institutions.

Taxation. "Income Taxes—Free Bonds." By Thos. L. Marshall, of Chicago. 9 Illinois Law Review, p. 421 (Jan.).

This article discusses the so-called "tax-free" bonds, to-wit: bonds containing coupons to pay interest without deductions for taxes. The question with regard to these bonds is whether a corporation must pay interest in full to the bondholder and also pay one per cent to the government on account of the bondholder's income tax, or whether the obligation is fully discharged by paying the bondholder the balance after deducting the tax which it is required to pay. The author thinks that the author of the stockholder. It would penalize the corporation for acting without recompense as an agent for the government aiding in the collection of an easily evaded tax. It would place in the hands of the bondholder the power to compel the corporation to pay a tax far in excess of the tax upon that part of the income which the interest represents, and in many cases to pay amounts not due the government at all. A consideration of such unjust consequences surely would impel a court to construe the law and the covenants in these 'tax-free' bonds as not requiring the corporation to pay the bondholder's income tax unless it is very clearly 'so nominated in the bond.'"

Trial and Procedure. "Studies in English Civil Procedure." By Samuel Rosenbaum, London. 63 Pennsylvania Law Review, p. 505 (April).

The author continues the discussion of English procedure, which was begun in the March number of this paper. He discusses what is known as the Rule Making Authority. He shows that the Rule Committee of the House of Lords is constantly amending the Rules so as to make them apply to ever changing conditions. Thus, where a Judge in Chambers or some branch of the Court of Appeal interprets a Rule in such a way as to impair its usefulness or to restrict its scope the matter is at once brought to the attention of the Rule Committee, who promulgate an alteration in the wording or an addition to it which will make it clear, so that without expressly overruling decisions the committee is able to effectually overcome their binding force. The author discusses a number of instances where the Rules as first formulated did not fit all cases or work exactly as they were intended to do, but he shows that as various proceedings have shown the necessity for a new Rule or a modification of the old Rule the situation has been promptly met so that procedure in England to-day is very elastic, and failure to observe a Rule does not create error that will impeach a judgment. Even the pleadings furnish no ground for error in English practice, as they may contain little or nothing, just so they serve as a notice to the defendant of the cause of action they are sufficient. If the latter wishes to know more about the cause of action he may ask for what is known as a bill of particulars. The Rule has worked out satisfactorily, according to the author, as it puts the duty on the defendant to determine the line of battle, as the answers to the defendant's interrogatories become part of the original pleading. The author shows that in an action for libel, all that is necessary is to state the names of the plaintiff and the defendant, the amount of damages, followed by the statement that plaintiff's claim is for damages for libel. The wonderful simplicity of this kind of pleading will appeal to lawyers in many states who are compelled to labor so diligently on their mittee has practically legislative powers under the provisions of the Act of Parliament with relation to the formation of new Rules of practice. One of the duties of the Rule Committee is to provide new Rules when new actions are created by an Act of Parliament.

CORRESPONDENCE

MEETING OF THE BAR ASSOCIATION OF TENNESSEE.

Editor Central Law Journal Company:

Replying to your letter of the 20th inst., I take pleasure in advising that the date of the next annual meeting of the Bar Association of Tennessee has just been fixed by the central council, and while the program has not yet been completed, I take pleasure in giving you such information as I have and later on will be glad to furnish you the completed program.

The annual meeting of the Bar Association of Tennessee will be held at Signal Mountain Inn, Chattanooga, Tenn., June 24 and 25. On the first day of the meeting an address will be delivered by the Hon. Peter W. Meldrim, of Savannah, Ga., president of the American Bar Association, and on the 25th an address will be delivered by the Hon. Alfred P. Thom, Washington, D. C., general counsel of the Southern Railway Company. Both of these men are able speakers and will no doubt have a large and representative gathering of the lawyers of Tennessee to hear them. The remainder of the business sessions of the meeting will be devoted to the consideration of the reports of committees and the discussion of the important matters contained in these reports.

Signal Mountain Inn is a new summer resort surrounded by scenes of natural beauty, and is an ideal place for the lawyers to meet and enjoy the numerous social features which will be provided in addition to the business sessions. Yours truly,

CHAS. H. SMITH, Secretary.

Knoxville, Tenn

BOOKS RECEIVED

Other People's Money, and How the Bankers

HUMOR OF THE LAW.

A member of the International Prison Commission tells of a visitor to a New England jail who was much impressed by the manners of the prisoners.

"They seem so gentle and so polite," said she to the prison official who was showing her about, "I knew there were no really hardened criminals here, but I was not prepared to find such courteous, even cordial, men."

"Oh, they are cordial and courteous, all right," said the official, "but I'd rather have less manners myself."

"You would!" exclaimed the visitor.

"I would ma'am," continued he. "Six months ago one of the politest men I had here escaped one night, and left a note for me saying, 'I trust you will pardon me for the liberty I take?'"

A story which might bring some comfort to badgered witnesses is told in connection with Colonel Fowler, one of General Shaler's staff. He was a clever lawyer as well as a good soldier, and he once fell into the hands of a fellow-lawyer, whose chief ability lay in the direction of abusing plaintiff's attorneys and confusing their witnesses.

On the occasion in question Colonel Fowler was on the stand to establish his signature to a document, and swore without hesitation that it was a genuine autograph.

"Now, sir," said the lawyer, with a threateningly and impressive gesture, "on your oath—on your oath, remember—how do you know that is your signature?"

"Well, sir," replied Colonel Fowler, unmoved by the man who was apt to make timid witnesses confused and even hysterical in some cases, "on my oath I don't know how I know that is my signature, but I do know it."

The lawyer was a little taken back by this calm reply, and before he could rally from his surprise the judge spoke up.

"That will do counsel or," said he, "the witness is right. No man can know how he knows a thing of that sort, and the witness's answer has exhausted the subject The human mind is incapable of analyzing its own action by which it attains this mysterious knowledge."

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Abstracts of Title**—Method of Making.—The date over the printed signature on a copy of an abstract of title, followed by certain other recitals and the written signature of the abstractors, held to apply to the written signature under the rule that it will be presumed prima facie that documents are made, written and signed on the day or days they bear date.—Wilson v. Glos, Ill., 107 N. E. 630.

2. **Admiralty**—Final Decision.—An order entered in a proceeding for limitation of liability, denying a motion to dismiss the petition and vacate an order restraining the presecuting of actions in a state court is not a final decision, and is not appealable.—The Transfer No. 21, U. S. C. C. A., 218 Fed. 636.

3. **Adverse Possession** — Exclusiveness. — While possession may be maintained by using

5. **Arrest**—Vacation of Order.—Where the complaint incorporated in the affidavit on which an order of arrest was based was treated by plaintiff as stating a cause of action for fraud and deceit, and failed to show detriment to plaintiff therefrom, the court properly vacated the order of arrest.—Brown v. Ball, N. D., 150 N. W. 890.

6. **Assignments**—Void.—Payment of a debt to the assignee thereof with knowledge that the assignment is void will not discharge the debtor from liability to the assignor.—Atlanta Finance Co. v. Southern Ry. Co., Ga., 84 S. E. 147.

7. **Associations**—Evidence. — On the issue whether defendants were liable for debts of a proposed social club of which they agreed to become members, that they would not have entered the club if they were to be liable for its debts was immaterial.—Fetner v. Americn Nat. Bank, Ga., 84 S. E. 185.

8. **Bankruptcy**—Claim.—A claimant, which advanced money to bankrupt for purchase of cotton seed to be shipped to it, held entitled to reclaim seed remaining in storage and not shipped at time of bankruptcy, although an unknown part of it had been paid for by bankrupt. —Southern Cotton Oil Co. v. Elliotte, U. S. C. C. A., 218 Fed. 567.

9.——Discharge.—Trustee's failure to prove the whole amount alleged to have been concealed by bankrupt, held immaterial on objections to the bankrupt's discharge.—In re Magen, U. S. D. C., 218 Fed. 692.

10.——Discharge.—A bankrupt, not having applied for a discharge within the time specified, is barred from a discharge of the debts scheduled, and cannot obtain a discharge by instituting a new proceeding, scheduling the same debts.—In re Loughran, U. S. C. C. A., 218 Fed. 619.

11.—Distress Levy.—Where a distress levy was stayed by bankruptcy proceedings, and the goods were sold by the tenant's receiver in bankruptcy, the constable was not entitled to fees for a sale out of the proceeds.—In re Hageman, U. S. C. C. A., 218 Fed. 708.

12.——Homestead.—Transfer of logs cut from a debtor's homestead under an oral agreement held to have been followed by an immediate delivery and change of possession as against the trustee in bankruptcy, within Rev. Codes Idaho, §3170.—In re McCartney, U. S. C. C. A., 218 Fed. 717.

13.——State Court.—That a state court by its receiver has taken possession of the property of a corporation does not absolve a federal court from the duty of adjudging it a bankrupt, where the requisite grounds are alleged and proved by the petitioning creditors.—In re Maplecroft Mills, U. S. D. C., 218 Fed. 659.

14. **Banks and Banking**—Collateral Security. —A national bank making loans and taking corporate stock as collateral security therefor, in the usual course of business, may enforce its rights against the stock.—Corn Exch. Nat. Bank v. Kaiser, Wis., 151 N. W. 259.

15. **Bills and Notes**—Accord and Satisfaction. —Where the sole consideration for a note sued on was an agreement to surrender another note

18. **Brokers**—Burden of Proof.—The burden of showing that the purchaser is able, ready, and willing to purchase rests ordinarily on the broker in his action for a commission for negotiating a sale.—Low Moor Iron Co. of Virginia v. Jackson, Va., 84 S. E. 100.

19.——Evidence.—A broker suing on a contract for commissions on sale of real estate without restrictions may not show that the owner subsequently executed a deed without restrictions to prove the contract alleged.—Greene v. Agnew, Wis., 151 N. W. 268.

20. **Carriers of Goods**—Act of God.—A strike accompanied with violence and intimidation may be treated as an "act of God" as far as it may cause delay, on the part of a carrier in transporting goods.—Southern Cotton Oil Co. v. Louisville & N. R. Co., Ga., 84 S. E. 198.

21.——Limitation of Liability.—To exempt a carrier from liability, or to limit its liability for injury to an express messenger, for injury caused by its own negligence, the contract or release must expressly and plainly so provide. —Cottrell v. Michigan United Traction Co., Mich., 150 N. W. 857.

22. **Carriers of Passengers**—Carrying Beyond Station.—A carrier must safely deliver a passenger at his destination, and, if it carries him beyond and he is directed by its conductor to alight, must provide safe means of return to the station.—Miller v. Pacific Electric Ry. Co., Cal., 145 Pac. 1023.

23.——Duty to Passenger.—If passenger who reached junction point in ignorance that train had been withdrawn was justified in remaining until the next morning, she was a passenger to whom the company owed the duty under the common law and by Kirby's Dig. Ark. § 6634, of exercising reasonable care to furnish her a reasonably safe and comfortable depot.—R. I. & P. Ry. v. Stephens, U. S. C. C. A., 218 Fed. 535

24. **Commerce**—Federal Employers' Liability Law.—Where a carrier's servant was injured while coupling an engine to a baggage car, the carrier was not liable under the federal Employers' Liability Act, though it intended to incorporate in the train freight cars then in interstate commerce.—Atchison, T. & S. F. Ry. Co. v. Pitts, Okla., 146 Pac. 1148.

25.——Hours of Service.—Hours of Service Act held not to apply to engineer of work train operated wholly within one state, though upon interstate line of railroad and hauling materials for its repair.—United States v. Chicago, M. & P. S. Ry. Co., U. S. D. C., 218 Fed. 701.

26. **Conspiracy**—Civil Law.—Failure to establish an allegation of civil conspiracy does not abate the suit; the establishment of a direct liability against one or more of the defendants being sufficient to support an appropriate decree.—Medlin Milling Co. v. Moffatt Commission Co., U. S. D. C., 218 Fed. 686.

27. **Constitutional Law** — Amendments. — Under Const. art. 10, § 1, regulating the proposal of constitutional amendments by the legislature, two or more resolutions containing amendments need not be voted upon separately by the Senate. —Jones v. McClaughry, Iowa, 151 N. W. 210.

28.——Delgation of Power.—The bestowal of powers of local governments upon municipal corporations in matters of local concern does not violate the rule that legislative power must not be delegated.—People v. Vickroy, Ill., 107 N. E. 638.

29.——Equal Protection.—Acts 1907, c. 5597, requiring insurance companies to pay 2 per cent of the gross receipts from policy holders in this state, held not to constitute a denial of equal protection of the laws.—Peninsular Casualty Co. v. State, Fla., 67 So. 165.

30. **Contracts**—Architect.—Where, at the re-

that the contractors performed their work properly, but not to be an insurer therof.—Cowles v. City of iMnneapolis, Minn., 151 N. W. 184.

32. **Corporations**—Contracts.—Where a contract was made for a corporation by its president, the fact that it was signed, "W., President," or "Pt.," did not make it the personal contract of the president.—Herndon v. Wardlaw, S. C., 84 S. E. 112.

33.——Foreign.—Where a foreign corporation did no business in North Dakota except to solicit orders for grain to be shipped to it at its domicile, it could not be lawfully sued in North Dakota, though it had attempted to comply with Laws N. D. 1897, c. 5, as amended by Laws N. D. 1903, c. 56.—Cooper v. E. L. Welch Co., U. S. D. C., 218 Fed. 719.

34.——Inspection.—That the inspection sought by a director may disclose a right of action against the corporation or its agents does not preclude his right of inspection.—State v. Ice, W. Va., 84 S. E. 181.

35.——Officers.—Where dealings in futures between complainant's treasurer, with its funds, and defendant, were entirely in the name of defendant corporation, a recovery of the money lost would be confined to defendant, and could not be extended to its officers and directors.—Medlin Milling Co. v. Moffatt Commission Co., U. S. D. C., 218 Fed. 686.

36.——Receivership.—Where a receiver was appointed for a corporation defendant pending an action for tort, judgment could not be granted in that action against the receiver.—Sundles v. Idaho-Oregon Light & Power Co., U. S. D. C., 218 Fed. 698.

37.——Unpaid Subscription.—Whether an unpaid subscription to the stock of an insolvent corporation shall be enforced to equalize stockholders who have paid their subscriptions in full is within the discretion of the court administering the corporation's affairs.—Graves v. Denny, Ga., 84 S. E. 187.

38. **Courts**—Waiver.—Where proper diversity of citizenship is alleged, and defendant pleads to the merits, he does not waive right to plead to the jurisdiction, if, as soon as it appears that the citizenship of the parties has not been properly alleged, he pleads to the jurisdiction.—Lehigh Valley Coal Co. v. Yensavage, U. S. C. C. A., 218 Fed. 547.

39. **Criminal Law**—Appeal and Error.—Where accused expressly consents that a question may be answered by a witness, he cannot predicate error thereon or on the refusal to strike an answer responsive to such question.—State v. Hopkins, Idaho, 145 Pac. 1095.

40.——Judicial Notice.—It is not a matter of judicial knowledge that a road overseer is disqualified, by prejudice or bias, from serving as a juror on the trial of one accused of assaulting another road overseer.—Rowe v. State, Ga., 84 S. E. 132.

41. **Damages**—Measure of.—The measure of damages for the destruction of a building from an explosion was the deterioration caused in the market value of the whole property.—Forster v. Rogers, Pa., 93 Atl. 26.

42. **Divorce**—Recrimination. — Where each party had mistreated the other, and they could not live together as husband and wife, divorce held properly granted to each party.—Schirmer v. Schirmer, Wash., 145 Pac. 981.

43. **Dower**—Estoppel. — Where a judgment debtor lived five years after sale and made no objection thereto, though extensive improvements were made by the purchaser, it was too late, after his death, for his widow to claim dower rights in the property sold.—King v. King, Pa., 93 Atl. 20.

44. **Drains**—Commissioners. — A chancellor

of a stream.—In re Otter Tail Power Co., Minn., 151 N. W. 198.

46.——Special Assessment.—To pay from the funds collected by special assessments that part of the cost of a drainage ditch which is assessed against a county for draining highways would be a violation of Const. art. 2, § 24.—Wilkins v. Hillman, Okla., 145 Pac. 1111.

47. **Equity**—Homestead.—Where a sheriff's sale of homestead premises upon a husband's default in payments ordered for the wife's separate maintenance, without setting off the homestead, was void, the husband was not required to do equity by paying the amount due to secure the setting aside of the sale.—Klosowski v. Klosowski, Ill., 107 N. E. 634.

48. **Estoppel**—Notice.—A, joining with C in bond for loan, containing an agreement as to "premises described in the mortgage accompanying this bond," is charged with notice of C mortgaging the premises as fee-simple owner, and so estopped to assert a remainder against the mortgagee.—Northrup v. Ackerman, N. J., 92 Atl. 909.

49.——Personal Liability. — Where plaintiff proved a note against a bankrupt corporation, he is estopped to claim that the president had no authority to execute the note, and hence was personally liable.—New England Electric Co. v. Shook, Colo., 145 Pac. 1002.

50. **Evidence**—Jury.—The jury in weighing contradictory evidence may consider the accuracy of each witness' recollection, the reasonableness and consistency of each part of his evidence, his interest, and his demeanor while testifying.—Low Moor Iron Co. of Virginia v. Jackson, Va., 84 S. E. 100.

51.——Negative.—Testimony by the passengers in an automobile, that they looked for a street car at a time when the light was good and there was nothing to obstruct their view, and did not see any, is not negative testimony.—Rieck v. Chicago & Milwaukee Electric Ry. Co., Wis., 151 N. W. 243.

52. **Executors and Administrators**—Claim. — Under Code 1906, §§ 2105, 2106, the failure of the clerk to make any indorsement, showing probate, registration, and allowance of a claim against a decedent's estate, renders the claim invalid.—Stevens v. D. R. Dunlap Mercantile Co., Miss., 67 So. 160.

53. **False Imprisonment**—Respondeat Superior.—A boy working in a department store held without authority to make charges of larceny against a customer and cause her arrest, and the proprietor is not liable unless his act is ratified.—Rigby v. Herzfeld-Phillipson Co., Wis., 151 N. W. 260.

54. **Fraud**—Reduction of Claim.—Where a defrauded party is able to reduce a valid claim against himself, which he was induced by the fraud to assume, the defrauding party cannot complain because the settlement was so made, since the reduction inures to his benefit.—Patterson & Co. v. Peterson, Ga., 84 S. E. 163.

55. **Frauds, Statute of**—Description of Property.—A contract for the sale of land, successively described as the "Leonard Farm" and the "Leonard Place," held to refer to the same property, and therefore sufficient to satisfy the statute of frauds.—Noyes v. Bragg, Mass., 107 N. E. 669.

56.——Possession. — Where the purchaser, under a parol contract, takes possession, makes improvements, cultivates the soil, and does other acts indicating ownership, there may be such part performance as takes the contract out of the statute of frauds.—Parry v. Miller, Pa., 93 Atl. 30.

57. **Fraudulent Conveyances**—Bulk Sales Act.—Where a transferor complies with the Bulk Sales Act except that the notice is signed by tions of the market, even though it is expected that such purchase will be settled by set-off, instead of actual delivery.—U. S. D. C., 218 Fed. 686.

59. **Guaranty**—Burden of Proof.—In an action on a bond given to secure overdrafts for the purchase of cotton, the sureties have the burden of showing that checks honored by the bank were not given for the purchase of cotton, but for other purposes.—Lee v. Cleveland State Bank, Miss., 67 So. 146.

60. **Highways**—Commissioner of.—The commissioner of highways cannot, without consent of the owner of the fee, permit a drainage district to excavate a ditch and lay tile in the highway to drain lands not within the highway for other than highway purposes.—Moore v. Gar Creek Drainage Dist., Ill., 107 N. E. 642.

61.——Prescription.—Where tideland designated as a street on a plat was used by the public for more than 10 years after a third person acquired title, the public acquired by prescription a street, though the plat was invalid.—Mason County v. McReavy, Wash., 145 Pac. 993.

62. **Homicide**—Manslaughter.—The test of adequate provocation to reduce a homicide to manslaughter is the effect that the provocation would have produced upon an ordinary man of reasonable disposition.—State v. Smith, R. I., 93 Atl. 1.

63. **Homestead** — Abandonment. — Where a wife left the homestead and obtained a decree for separate maintenance, a sheriff's sale of the homestead for default in the payments ordered without setting off the homestead, was void, and the wife, as purchaser, was not entitled to a writ of assistance.—Koslowski v. Koslowski, Ill., 107 N. E. 634.

64.——Mortgage.—Where a wife living apart from her husband received a mortgage on the homestead to secure a post-nuptial settlement and subsequently foreclosed the mortgage, she was not entitled to recover rents and profits during the years of nonoccupancy against the holder of a void deed from her husband alone.—Wheelan v. Adams, Okla., 145 Pac. 1158.

65. **Insurance**—Accident. — Under a policy covering death by external, violent, "or" accidental means, held, that insurer was liable where insured was killed by gun by another, whether the fatal injury was accidental or not.—Oklahoma Nat. Life Ins. Co. v. Norton, Okla., 145 Pac. 1138.

66.——Avoidance of Policy.—The use of a gasoline engine in an insured barn to drive a threshing machine, does not avoid the policy under the clause, prohibiting an alteration of the situation, so as to increase the risk.—Bouchard v. Dirigo Mut. Fire Ins. Co., Me., 92 Atl. 899.

67.——Defenses.—Where the insurer did not specially plead as a defense pro tanto its reduced liability from the loss occurring while the building was vacant, such defense which was based on a condition subsequent, was not available.—Liverpool & London & Globe Ins. Co. v. Cargill, Okla., 145 Pac. 1134.

68.——Intoxication of.—Where there could be no recovery on the accident policy if deceased was intoxicated, the burden was on the defendant insurer to prove intoxication.—Thompson v. Bankers' Mut. Casualty Ins. Co., Minn., 151 N. W. 180.

69. **Internal Revenue**—Excise Tax.—A corporation's excise tax return held false, authorizing correction within three years, under Corporation Tax Law, Aug. 5, 1909, § 38, par. 5, though it was merely incorrect, and made in good faith under a mistake of law.—Eliot Nat. Bank v. Gill, U. S. C. C. A., 218 Fed. 600:

70. **Judgment**—Default.—A default judgment

petent workman, and the evidence showed that the cause was the fellow workman's negligence, the court properly entered judgment for defendant non obstante veredicto.—Hunter v. Chicago Ry. Equipment Co., Pa., 93 Atl. 18.

72.——Res Judicata.—Where plaintiff suffered a personal injury and the destruction of his automobile at a crossing, payment of a judgment recovered in an action for destruction of the automobile was no bar to a subsequent action for his personal injuries.—Boyd v. Atlantic Coast Line R. Co., U. S. D. C., 218 Fed. 653.

73. **Jury**—Partition.—The statute authorizing the court to determine all controversies in partition as to the legal title and right of possession held not violative of the constitutional right to a jury trial.—Terra Cela Estates v. Taylor, Fla., 67 So. 169.

74. **Landlord and Tenant**—Destruction of Premises.—Under provision that damage or destruction of premises should terminate a lease, and that lessee should pay rent only to time of his surrender, termination held not to entitle the lessee to recover proportionate part of monthly rent paid in advance.—C. M. Staub Shoe Co. v. Byrne, Cal., 145 Pac. 1032.

75.——Notice—That the landlord occupied one of the apartments in a tenement was not of itself sufficient to show that he had actual knowledge that the radiators in another apartment were defective.—McYere v. Withers, Ga., 84 S. E. 163.

76.——Rental Value.—The measure of a lessee's damages for total breach of his lease is the difference between the market rental value of the premises for the unexpired term of the lease and the rent reserved for such time.—King v. King, Wash., 145 Pac. 971.

77. **Libel and Slander**—Evidence.—In an action for a libelous publication held competent for plaintiff to show that he formerly did business under the name of the company designated, that his name was a part thereoof. and that the libelous statements referred to him.—Weatherholt v. Howard, Ga., 84 S. E. 110.

78.——Libelous per se.—Words written of one holding an office of profit, charging incapacity, want of integrity, or unfitness therefor, are libelous per se, because they render his tenure precarious and are a pecuniary detriment.—Children v. Shinn, Iowa, 150 N. W. 864.

79. **Life Estates**—Waste.—While the life tenant may recover for injury by negligence of a stranger not only to the life estate, but to the remainder, it is not on the theory of waste, but of trusteeship.—Rogers v. Atlantic, G. & P. Co., N. Y., 107 N. E. 661, 215, 246.

80. **Limitation of Actions**—Part Payment.—Part payment to toll the statute of limitations must have been voluntarily made or authorized or ratified by the debtor.—J. M. Arthur & Co. v. Burke, Wash., 145 Pac. 974.

81. **Mandamus**—Disobedience of.—Where noncompliance with writ of mandamus comanding obedience to order of railroad commission was in good faith, under colorable construction of the order, held that no punishment would be imposed if the company complied therewith within a time allowed for that purpose.—Michigan Railroad Commission v. Detroit & M. Ry. Co., Mich., 150 N. W. 861.

82.——Inspection.—An unsupported general allegation that relator's purpose in seeking inspection of the corporation's records and papers was to obtain knowledge for communication to a business rival, held insufficient to present any defense.—State v. Ice, W. Va., 84 S. E. 181.

83. **Master and Servant**—Hours of Service.—Where, in an action for violation of the Hours

85.——Release.—Release signed by a workman held not to bar his widow's claim to a compensation under section 2394-9, subsec. 3, subds. "a" and "b," and section 2394-10, subsec. 6.—Milwaukee Coke & Gas Co. v. Industrial Commission, Wis., 151 N. W. 245.

86.——Safe Appliances.—Ordinary diligence requires that a master furnish apliances reasonably suited for the uses intended, but not for unintended uses to which they may be casually or unexpectedly applied.—Williams v. Alabama Great Southern Ry. Co., Ga., 84 S. E. 149.

87.——Workmen's Compensation Act.—The purpose of the Workmen's Compensation Act, pt. 2, was to secure to the widow, or dependent next of kin, a percentage income based on their pecuniary loss as represented by the employe's compensation.—State v. District Court, Sibley County, Minn., 151 N. W. 182.

88.——Workmen's Compensation Act.—Under Workmen's Compensation Act, findings of fact of the Industrial Commission are conclusive except (1) for lack of jurisdiction, (2) when fraudulent, and (3) when they do not support the award.—City of Milwaukee v. Industrial Commission, Wis., 151 N. W. 247.

89.——Workmen's Compensation Act.—In a proceeding under the Workmen's Compensation Act, a finding that decedent at the time of his injury was walking on a railroad track, and that the accident did not arise out of his employment, held conclusive on certiorari.—Sternientkowski v. Berwind White Coal Mining Co., N. J., 92 Atl. 909.

90. **Mortgages**—Assumption of Debt.— A grantee, who agreed to assume incumbrances to an amount exceeding the actual incumbrance, is liable to the grantor for the difference as money had and received; but a creditor of the grantor cannot recover the amount without an assignment from the grantor.—Brazeau v. McBride, Wis., 151 N. W. 253.

91. **Municipal Corporations**—Police Power.—The prohibition of the operation of stone crushers in certain districts within a city cannot be justified under the police power if such operation is permitted in another district where it interferes more with the health, welfare, or safety of the surrounding residents.—Ex parte Throop, Cal., 145 Pac. 1029.

92.——Sidewalks.—Where C, having a license, gave a contractor's bond under Rev. Laws 1910, § 3881, and C and R, after contracting with reference to such bond and license to construct sidewalks, gave another bond, but not containing the same provisions, held that persons furnishing material to C and R could recover from the sureties.—Dolese Bros. Co. v. Chaney & Rickard, Okla., 145 Pas. 1119.

93.——Taxation.—A corporation can be taxed by the city wherein it had its principal place of business, on a lease of property on property without the city.—Johnston v. Harrison Naval Stores Co., Miss., 67 So. 147.

94. **Navigable Waters**—Accretion.—In the absence of assertion of title by the government, extension of land of an island along a slough by pumping of sand therein by the government in dredging another channel held to accrue to the shore owners as accretion.—Gillihan v. Cieloha, Ore., 145 Pac. 1061.

95. **Negligence**—Trespassor.—As respects liability for injury to a trespasser, persons in possession at the place of injury, and there having an easement, are to be treated as the landowners.—McLaughlin v. Bardsen, Mont., 145 Pac. 954.

96. **Nuisance**—Prostitution.—Where prostitution is being carried in a hotel with the

98. **Quieting Title**—Publication.—Plaintiff, in action to quiet title, showing a judgment, the execution with the sheriff's return showing the sale and affidavit showing due publication of notice of sale, and sheriff's deed in proper form, showed his acquisition of the judgment debtor's title.—Strauss v. Canty, Cal., 145 Pac. 1012.

99. **Railroads**—Due Care.—Due care held not to require that speed of electric car in sparsely settled neighborhood approaching unused driveway, where children were not accustomed to play, and had never been seen by the motorman, should be reduced to four or five miles an hour.—Copeland v. Exeter, H. & A. St. Ry. Co., N. H., 92 Atl. 924.

100. **Removal of Causes**—Pleading.—Though petition for removal to federal court failed to show diverse citizenship when the action was commenced, held that a judgment for plaintiff would not be reversed when from the whole record diverse citizenship could fairly be presumed. —La Belle Box Co. v. Stricklin, U. S. C. C. A., 218 Fed. 529.

101. **Sales**—Rescission.—A buyer of goods has a reasonable time in which to ascertain fraud or whether the goods come up to the guaranty, and, when he ascertains fraud or breach of guaranty, must notify the seller and either return the goods or offer to return them.—Anderson v. Merchants' Grocery Co., S. C., 84 S. E. 109.

102.——Special Purpose.—Where an engine of the buyer is known to be intended for use with a hoist contracted to be built according to definite specifications, in an action for the price of the hoist, it is no defense that the engine could not develop the power necssary to work it.—Mianus Motor Works v. Vollans, Wash., 145 Pac. 997.

103.——Warranty.—A warranty in a sale to a laundry company of a water-softening apparatus, held to apply only to water of substantially the degree of hardness as that analyzed prior to sale.—Wendell & Evans Co. v. Kennicott Co., U. S. C. C. A., 218 Fed. 622.

104. **Sheriffs and Constables**—Levy.—Where on demand for the return of property levied on, which property exceeds the amount exempt, there is no effort to make a selection, the judgment debtor cannot recover damages in a subsequent replevin action against the officer.—Parsons v. Evans, Okla., 145 Pac. 1122.

105. **Specific Performance**—Certainty.—A contract to lease, providing a certain amount of rent per year, required payment at the end of the period, and was therefore not too uncertain for specific performance because it did not specifically state when the rent was to be due.—Bushman v. Faltis, Mich., 150 N. W. 848.

106.——Contract to Convey.—Where, pending contract to convey land, the vendee had accepted payment for rights acquired by a telephone company, a decree of specific performance should only require a conveyance of good title subject to the telephone company's rights.—Noyes v. Bragg, Mass., 107 N. E. 669.

107.——Covenant.—Where a covenant for the establishment of a crossing over a railroad company's right of way provided for a particular kind of crossing, a court of equity cannot direct a different sort of crossing.—Linthicum v. Washington, B. & A. Electric R. Co., Md., 92 Atl. —7.

108.——Decree.—A purchaser may have specific performance of that part of the contract which the vendor can perform with compensation for that part which he cannot perform, whether the contract be one of sale or exchange. —Mundy v. Irwin, N. M., 145 Pac. 1080.

109. Street **Railroads**—Humanitarian Doc-

Cook v. Los Angeles Ry. Corporation, Cal., 145 Pac. 1013.

111. **Taxation—Notice.**—The burden of showing compliance with the statutory requirement of mailing notice, not recited in the collector's tax deed, was on the defendant claiming under the deed.—Strauss v. Canty, Cal., 145 Pac. 1012.

112.——Notice of Assessment.—Under Laws Idaho 1913, p. 202, § 95, where state board of equalization, after granting hearing to taxpayer, adopted tentative valuation and adjourned, taxpayer held not entitled to notice before making of assessment at adjourned meeting increasing such valuation.—Idaho Ry., Light & Power Co. v. Monk, U. S. D. C., 218 Fed. 682.

113. **Telegraphs and Telephones**—Mistake.—The sending company is liable for a mistake made by an employe of another company over whose lines the message is transmitted.—American Express Co. v. Postal Telegraph-Cable Co. of Nebraska, Neb., 151 N. W. 240.

114. **Trade-Marks and Trade-Names** — Infringement.—The word "Wiener," used to designate a corset, although the surname of the person using it, held an infringement of the trademark "Warner."—Warner Bros. Co. v. Wiener, U. S. C. C. A., 218 Fed. 635.

115. **Trusts**—Mingling Funds.—Where a trustee has mingled trust funds with his own in a bank account, and the deposit has not been depleted below the amount remaining at the end of a period, or below the trust amount, it will be presumed that it includes the trust fund.—Southern Cotton Oil Co. v. Elliotte, U. S. C. C. A., 218 Fed. 567.

116.——Naked Trust.—A naked power to sell under a trust instrument does not include authority to arrange terms of postponing payment of the price, or to accept a mortgage or anything other than money in payment.—Durkin v. Connelly, N. J., 92 Atl. 906.

117. **Vendor and Purchaser** — Estoppel. — Where a vendor gave the purchaser a reasonable time to accept an offer before withdrawing it, is it not estopped from refusing to perform because the purchaser had bought land to enable him to accept the offer.—Brown Bros. Lumber Co. v. Preston Mill Co., Wash., 145 Pac. 964.

118.——Notice.—Where a landowner executed an absolute deed to secure a loan and remained in possession, and the land was subsequently conveyed by the grantee to two persons, one with knowledge of the character of the former deed, both were chargeable with notice.—Williams v. Purcell, Okla., 145 Pac. 1151.

119.——Tender.—A vendee not in default, having made a tender of an installment of the price and been refused, was not required to make a further tender.—Noyes v. Bragg, Mass., 107 N. E. 669.

120. **Waters and Water Courses**—Surface Water.—A landowner may drain surface water into a pond having no natural outlet, where it is impracticable to drain it into a natural water course.—Hopkins v. Taylor, Minn., 151 N. W. 194.

121. **Wills**—Execution.—Where the testatrix did not acknowledge or declare to the other subscribing witness that the instrument was her will, the impeachment of one of the subscribing witnesses, who denied acknowledgment, does not warrant probate of the will.—In re Williams' Will, Mont., 145 Pac. 957.

122.——Express Trust.—Testator, who directs that his debts shall be paid by his executor, who may sell real estate for division or otherwise, does not create an express trust for payment of debts.—Stevens v. D. R. Dunlap Mercantile Co., Miss., 67 So. 160.

123.——Incapacity.—Mental weakness on the

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STATE POLICE POWER AS TO GOODS SHIPPED IN INTERSTATE COMMERCE.

We believe that, by a recent decision of the Federal Supreme Court, it first has been held, that a state may in the exercise of its police power forbid delivery to a carrier for shipment in interstate commerce impure articles or decaying fruits. We come to this conclusion, both because we remember no such holding before and further because the court in its opinion cites no case in direct support of its ruling. All of this is, of course, where no direct federal law covers the subjectmatter. Sligh v. Kirkwood, 35 Sup. Ct. 501.

It is objected that a state statute making it a misdemeanor to "ship or deliver for shipment any citrus fruits which are immature or otherwise unfit for consumption" could not affect shipments in interstate commerce, because as so applied the "statute is not a legitimate exercise of the police power, as it has the effect to protect the health of people in other states who may receive the fruits from Florida in a condition unfit for consumption." There is no doubt the statute has this effect, but it was not conceded by the court that this was its only effect.

Mr. Justice Day, speaking for the court, said: "We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption and would certainly affect the successful conduct of such business within the state. The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of the purpose."

How much of this excerpt expresses indispensable ingredients in the right of exercise of police power, or how greatly it merely summarizes conditions possibly considered by the legislature it is difficult to say.

Is it a *sine qua non* of such legislation intended to influence conditions beyond its borders, that these conditions concern "one of the great industries of the state?" May the bad health of a foreign purchaser of immature fruit raised in a great industry be of itself considered or only the resultant effect in the market on the great industry?

It is a rule of evidence, that you cannot pile one presumption on another, but you may, it would seem, make concatenation in construction of laws *ad infinitum*, provided some harm eventually may result to a thing of great public concern in a law's jurisdiction.

We but dimly may suggest the outer confines of such legislation as this. Over the foreign markets the state of such a law has no semblance of control. The states where they are might think them beneficially affected by such a statute as this. They might have legislation encouraging what is thought to injure the local interest of another state. May they not, for example, encourage a great business in mercantile pursuits, confined to articles in interstate commerce, and free them from regulation at their point of shipment.

concern a state having such a law to enforce its own inspection than to allow another state to anticipate it in this way? It is not sufficient to say it still has the right of inspection as to residue of shipments. The point is that it may think it has the right, in encouraging its own markets, as also in protection of the health of its citizens, to have full shipments and cull therefrom after its own policy.

We see no great harm in this particular case, but it does seem to us, that, if a state may exercise its police power towards obviating or avoiding harmful results from a reflex influence abroad—protecting reputation abroad—there lies before state legislatures a large field of enactment as to conditions outside of their borders and, possibly, retaliatory laws would have their innings as well.

NOTES OF IMPORTANT DECISIONS

EVIDENCE—INFERENCE BASED ON INFERENCE.—The rule, that presumption cannot be piled on presumption, or inference cannot be based on inference, is a rule that must have its limitations. If the two presumptions are those of law or the former of law and the latter of fact, we do not think the rule has any recognition. Take, for example, the presumption that a sane person intends the natural consequence of his acts, and we think there is no difficulty from any rule of evidence in drawing an inference from a particular fact.

And when it is said that inference of fact cannot be deduced from another inference of fact, we must distinguish inference of fact from circumstantial evidence of the existence of a fact.

This thought is suggested by a recent decision by St. Louis Court of Appeals in Wright v. United Commercial Travelers of America, 174 S. W. 833. This was a suit on an accident policy, and while we agree with the conclusion reversing a judgment for plaintiff, it seems

There was no autopsy, but it appeared from the evidence that insured was a strong, robust man and there were no marks on the body other than the pallid condition of the face, congested appearance about the mouth and a congested condition appearing about the back of the neck and head. There was no effusion of blood from any part of the body, but medical witnesses said that death evidently resulted from the rupture of an artery, and that this rupture (if there was a rupture) came from overexertion in the work on a hot day.

The court applies the rule that no presumption is allowed upon a presumption in such a case as this, as there was no direct evidence of a rupture, and the jury inferring a rupture further inferred that it was occasioned by accidental means.

In overruling motion for rehearing the court discusses a former Missouri case, where there was no visible evidence of a ruptured artery or organ other than insured testifying to a strain in lifting and his being seized with a hemorrhage and spitting blood. We think this case merely showed a stronger case of circumstantial evidence than the case being considered.

If physicians testified that pallor and congestion, without effusion of blood, tended to show rupture in a man dying so suddenly that he could not spit up blood or he even would not froth at the mouth, that might be weak testimony, but it was testimony tending to prove a fact, and if it strongly so tended it seems to be admitted by the court it would not merely be regarded as evidence to prove inference of a fact, but the fact itself. We do not know of any rule that calls proof of a fact by circumstantial evidence merely proof of inference of a fact.

WORKMEN'S COMPENSATION ACT — CHAIN OF CAUSATION IN PROXIMATE CAUSE.—In re Sponatski, 108 N. E. 466, decided by Massachusetts Supreme Court, was considered a case of compensation claimed where decedent took his life while insane, the insanity being alleged to have resulted directly from a physical injury suffered out of and in the course of employment.

The court said: "The obligation to pay compensation under the Workmen's Compensation Act is equally (as in ordinary cases) absolute when the fact is established that the injury and in the course of that employment. If death ensues, it is immaterial whether that was the reasonable and likely consequence or not; the only question whether in fact death 'results from the injury,' when that is established as the cause, then the right to compensation is made out. If the connection between the injury as the cause and the death as proven, then the right to compensation is made out. * * * The inquiry relates solely to the chain of causation between the injury and the death."

The court, then, goes on to say that this rule had been declared in several English cases it cites and had been held by it, in effect, in Daniels v. Railroad, 183 Mass. 313, 62 L. R. A. 751, where conscious suffering and death was caused by failure of defendant to give statutory signals of warning, where a railroad crossed a highway at high grade.

This decision seems useful as showing that construction of Workmen's Compensation Act will be as is the ordinary rule as to proximate cause and the words, for example, "out of and in the course of employment," do not mean immediately out of or in etc., their apparently limited scope to the contrary notwithstanding.

ACCOMPLICES—WOMAN PARTICIPANT UNDER WHITE SLAVE ACT.—In Diggs v. United States, 220 Fed. 545, decided by Ninth Circuit Court of Appeals, affirming sentence of conviction under White Slave Act, the ruling in United States v. Holte, 236 U. S. 140, 35 Sup. Ct. 271, commented on in 80 Cent. L. J. 194, is followed.

That case held, that the woman participant under the act need not necessarily be regarded as the victim and she could be indicted for conspiracy to accomplish the offense denounced thereby.

In the Diggs case the court refused to instruct the jury to determine whether females involved were accomplices and if they so found their testimony was to be received with caution and scrutinized with great care. After stating that such a refusal does not constitute reversible error, the court went further and said the women were not accomplices. It quotes as follows in this regard: "The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offense of which the accused is being tried. 12 Cyc. 445."

"Where a penal statute is intended for the

as sustaining its view, and technically it does sustain it. In that case the court held, as we understand it, that the woman could not be indicted for the very act that had been committed in which she was the victim, but she could be indicted for conspiring to have a man commit that act, a sort of logic, which, adopting a word by the writer of the Supreme Court's opinion, is far from "ineluctable."

But be that as it may, the only reason for the rule of evidence was because an accomplice was esteemed wanting in credibility, so much so that some courts require their testimony to be corroborated. Here one not deemed so far a victim that she cannot be prosecuted in some form as to the offense, is yet not under the accomplice rule. Is the rule based on reason or is it a mere precedent, and courts will not inquire whether it is covered or not, or extend it logically?

MURDERER TAKING UNDER WILL OR BY INHERITANCE.

Preliminary.—The maxim *nullus commodum capere potest de injuria sua*[1]—no one shall profit by his own wrong—has application in many directions and to manifold things, for example, by the indirect violation of an injunction;[2] by the personal fraud of a corporate officer;[3] by retention against liens of land acquired by fraud;[4] by wrongfully interfering with the performance of a contract;[5] or by taking title as a cloak for recent fraud.[6] These examples are merely illustrative of the diversified application of the maxim, and are very far from being exhaustive of the situations in which it may come into play.

Insured Being Convicted for Murder.—A case more closely relating to the question I purpose to consider is, that, where insured who had committed a murder assigns a policy of insurance on his own life payable to

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(1) 2 Hughes Procedure 1062.

Ala. 130, 30 So. 611,

his estate,[7] he is subsequently convicted and executed. Mr. Justice Brewer said there was nothing in the policy, that "even remotely by suggestion or inference" bore on such a contingency. He said the real question was: "Do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?"

He then said: "The researches of counsel have found but one case directly in point. The Amicable Society v. Bolland, decided by the House of Lords in 1830 and reported in 4 Bligh. N. S. 194, 211." He quoted from the Lord Chancellor to the effect that, if a policy insured a person upon condition of his committing a capital felony and being convicted and executed therefor, it would not be possible for it as a contract to be sustained. This being true, it could not be claimed that an implied condition may go further than an express condition might provide.

Applying this principle to an assignment made after the commission of the murder for which assured was executed, it was said that: "Plaintiffs * * * claimed directly under the insured and sought to recover on a policy obtained by him, the maturity of which was accelerated by his execution for crime." The assignees were denied recovery.

There were considered here cases of beneficiaries in life insurance policies both of suicide by insured[8] and of his murder by beneficiaries.[9] As to the latter class of cases it is to be said as stated by Supreme Court of North Carolina,[10] that: "The wholesome doctrine referred to the maxim *nullus commodum capere potest de injuria sua propria* has been uniformly upheld, so far as we are aware, except in certain cases where the interest involved was conferred by statute, and the statute itself does not recognize any exception." In the former class of cases diversity in opinion in no way is referable to any dispute in regard to the doctrine itself.

I may cite in this connection a Massachusetts case,[11] which lies between the Burt case and the Armstrong case in holding, that a beneficiary cannot recover upon a policy, where a woman, without any justifiable medical reason, submitted herself to an illegal operation, with intent to cause an abortion and died therefrom. The court said: "We can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation would be contrary to public policy, and could not be enforced in the courts of this commonwealth."

Further Inquiry into Cases of Conviction of Insured for Murder.—There was a dissenting opinion in the Burt case, ***supra,*** as it appeared in Circuit Court of Appeals,[12] in which the ground was taken that the conviction for murder was not conclusive against the beneficiary under the policy, and a more recent case by Illinois Supreme Court,[13] decided in 1907, does not refer to the Burt case, either as decided by Circuit Court of Appeals or by U. S. Supreme Court, except in a general way as among cases based upon the Bligh case *supra,* decided by House of Lords in 1830. It was said that this represented only English policy and not American policy, and it was held that the argument of English policy "rests upon the same grounds that were urged centuries ago in support of the now obsolete doctrine of attainder and corruption of blood. * * * The Constitution of the United States provides that 'no attainder of treason shall work corruption of blood or

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(7) Burt v. Union Cent. L. Ins. Co., 187 U. S. 362. 47 L. Ed. 216.

(8) Ritter v. Mutual Life Ins. Co., 169 U. S. 139.

(9) N. Y. Mut. L. Ins. Co. v. Armstrong, 117

(11) Hatch v. Mut. L. Ins. Co., 120 Mass. 550. 21 Am. Rep. 541.

(12) Burt v. Union Cent. L. Ins. Co., 105 Fed. 419. 44 C. C. A. 548, 59 L. R. A. 393.

(13) Collings v. Met. L. Ins. Co., 232 Ill. 37, 83

forfeiture, except during the life of the person attainted,' and by an Act of Congress passed in 1790 all corruption of blood and forfeitures, whether for treason or felony, as to convictions under Federal law, were abolished." It is then recited that in all Illinois constitutions it is stated that "no conviction shall work corruption of blood or forfeiture of estate." It was upon this theory, and this only, that it was held, that the maxim of which mention above is made was held not to apply. As I have to consider this provision of our constitutions hereafter, I will not go into that inquiry now. Insurance policies frequently contain stipulations as to insured that "if death is caused or superinduced at the hands of justice or in violation of, or attempt to violate, any criminal law," a forfeiture arises,[13a] and these stipulations have frequently been before courts for construction.

Ruling That Murderer of Testator Forfeits Legacy.—There is what seems the pioneer case on the affirmative side of the proposition, that the murderer of a testator, who commits such murder for the express purpose of securing a legacy, thereby forfeits it,[14] and I may say there is no case prior to this holding that an heir forfeits his interest in the estate of an ancestor by the commission of murder, except that the Supreme Court of Nebraska followed this ruling,[15] until on a rehearing the ruling was reversed,[16] two of the three members of the court changing their view.

Riggs v. Palmer has been referred to so much in later cases, that it is useful to quote from and consider it at length, at the same time observing that it is quite singular, that no cases involving the precise question or that of murder by an heir preceded it, though several since have arisen. The case itself is not an old one, having been decided in 1889, and considering that the question so frequently has since arisen this may argue weightily against its being correct. The question of forfeiture by a beneficiary in insurance affirmatively had often been decided and has been since.

The opinion in this case was not unanimous, two of the seven judges dissented. The facts show, that a youth, aware of his grandfather's will making him his residuary legatee, murdered him by poison. He was convicted therefor and was serving out his term in prison. Two of testator's children sought to have the provisions of the will in the murderer's favor annulled.

The maxim above referred to was invoked and the entire discussion was whether by the statutes regarding wills and devolution of property there was room for the inclusion, under rules of construction, of an exception, not expressed therein, to their operation. It was said in 1 Blackstone's Commentaries, 91, in speaking of construction of statutes, that: "If there arise out of them any absurd consequences manifestly contradictory to common reason, they are, with regard to these collateral consequences void," and "when some collateral matter arises out of the general words, and happens to be unreasonable, then the judges are, in decency, to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it." The learned author then gave as illustrations the vesting of power in a man to try all causes "within his Manor of Dale" and said it did not include "his own quarrel," and a statute against drawing blood in the streets did not apply to a barber opening a vein in the street. Then the opinion asks: "What could be more unreasonable

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(13a) Supreme Lodge K. of P. v. Crenshaw, Ga., 58 S. E. 628, 13 L. R. A. (N. S.) 258; Bradley v. Mut. Ben. L. Ins. Co., 45 N. Y. 422, 6 Am. Rep. 115; Sup. Lodge, K. P. v. —, 181 U. S. 49, 45 L. Ed. 741.

(14) Riggs v. Palmer, 115 N. Y. 506, 5 L. R.

property, that they should have operation in favor of one who murdered his ancestor, that he might speedily come into possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws."

The opinion then proceeds upon the theory of an estoppel by the maxim above spoken of. As to this it is said: "Besides all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or take any advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries and have nowhere been superseded by statutes."

The opinion then refers to the Armstrong case *supra,* as applying these maxims and undoubtedly it also would have referred to the Burt case had the decision then have been rendered. The Burt case could, indeed, have been more forcibly used, especially as answering the opposing cases, because the Armstrong case referred to a contract in favor of the murderer, while the Burt case was of a contract in favor of a murderer's estate and his crime was purely collateral. Its consequences, however, operated on the contract, and as public policy would not permit payment of a policy to be conditioned upon the assured committing murder and being convicted and executed therefor, "its omission therefrom does not by implication give it life and validity." Suppose, however, statute were expressly to authorize payment on such a condition, would such a statute be constitutional? I will recur to this question again.

specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime, and thus be rewarded for its commission."

Reference was made in the opinion to a North Carolina case,[17] but the court declared its unwillingness to assent to the doctrine there laid down. That case showed that a widow applied to have dower assigned to her and resistance was made on the ground that she had been convicted of being an accessory before the fact to the murder of her husband. The trial-court ruled that to allow dower would be "to reward crime." The Supreme Court said: "Is the right of the wife to share in the personal estate as a distributee lost or affected by the fact, that the intestate died at her hands or through her procurement? Does the child, who slays a parent, thereby lose his right to participate with his brothers and sisters in the distribution of the personal or to take his part of the descended real estate? Or, reversing the matter, does the husband, who kills his wife impair his right, under the statute of distributions, to succeed to the ownership of her personal property left, after payment of her debts? Or, in general terms, does any one, as a consequence of an unlawful taking of human life, become thereby disabled to take a part of the estate left by the deceased, which the law gives him, and gives him subject to no such condition?" It was thought to "belong to the law-making power alone, to prescribe additional grounds of forfeiture."

It is to be noticed that the Riggs and Owens cases approach the matter from different standpoints, the former conceiving that the commission of the crime prevents a vesting and the latter that there is a vesting and the arising of a question of forfeiture *vel non.* The former case speaks quires whether by reason of crime it shall be divested. The former regards the act of death as not having the ordinary effect stated by the law, because of its being brought about in the way it is brought about, and the latter says howsoever it is brought about is of no concern, because thereby is wrought a change of title and the question is of forfeiture. The whole difference seems to be like that of a condition precedent, and a condition subsequent, and questions of forfeiture under these are vastly different.

It is interesting to note that the Owens case was decided only a year before the Riggs case was and the latter cites only it as precisely in point, and the Owens case says: "We have searched in vain for an authority or ruling on the question and find no adjudged case; the fact that none such is met with affords a strong presumption against the proposition." There is, however, no mention at all of the maxims to which the Riggs case refers, or to any question of public policy as involved.

It seems to be useful also to note here what was said in the Riggs case about this murderer as an heir. "Just before the murder he was not an heir, and it was not certain that he ever would be. He might have died before his grandfather or might have been disinherited by him. He made himself an heir by the murder, and he seeks to take property as the fruit of his crime. What has been said as to him as legatee applies to him with equal force as an heir. He cannot *vest* himself with title by crime."

It was said in a later New York case,[18] that the principle decided in the Riggs case did not make a will void, and the question could not be raised in a partition case, but a court of equity could intervene and de-
on the death of the testator and transferred the legal title and right given her by the will. The relief which may be obtained against her is equitable and injunctive. The court in a proper action will, by forbidding the enforcement of a legal right, prevent her from enjoying the fruits of her iniquity." The conclusion reached made, said the court, "it unnecessary to determine, whether a trial and conviction for the crime is a condition precedent to the invoking of the application of the doctrine of Riggs v. Palmer." This was an unanimous opinion and it seems rather a reaffirmance than a repudiation of Riggs v. Palmer. This case was decided in 1896.

The principle decided in Riggs v. Palmer has been recognized frequently by New York Court of Appeals,[19] the last of the cases cited saying of a charter which provided for the giving of a notice claimed to be insufficient that: "It cannot be reasonably presumed that the intention of the legislature in enacting this charter would lead to any such unjust conclusion. It is a fundamental canon of construction 'that a thing which is in the letter of a statute is not within the statute itself unless it is within the intention of the makers.' Riggs v. Palmer, 115 N. Y. 506. 509."

View That Constitutional Provisions Against Attainder Forbid Deprivation of Inheritance.—I have referred to the Collins case *supra,* as disagreeing with the Burt case and upon the express ground, that there was a constitutional bar to the deprivation under American law forbidding attainder for corruption of blood. A Pennsylvania case decided in 1895,[20] takes also this view in a case of an heir murdering his ancestor. The case quotes from the Declaration of Rights of the Constitution which prohibits

"No attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth. The estate of such persons as shall destroy their own lives shall descend or vest as in cases of natural death."

The court said: "In the case now under consideration it is asked by the appellant that this court shall decree that in case of the murder of a father by his son, the inheritable quality of the son's blood shall be taken from him and that his estate, under the statute of distributions shall be forfeited to others. We are unwilling to make any such decree for the plain reason that we have no lawful power so to do. The intestate law in the plainest words designates the persons who shall succeed to the estates of deceased intestates. It is impossible for the courts to designate any different persons to take such estates without violating the law."

It seems to me that there is some confusion of thought in the above excerpt. If the constitution forbids any corruption of blood by attainder and for that reason courts have no power to change the inheritable quality of a son's blood for his crime in becoming an heir, then neither can the legislature by statute cut him out. Yet the court refers to the statute as intending to embrace a son who has murdered his father, when the constitution forbids the legislature leaving him out, because of his being such murderer, if the court's view is correct.

But is it working corruption of blood to say that one who commits murder to make himself an heir, shall not so become? If it is, is it constitutional to declare it, whether by court or legislature? It does not seem to me that it is corruption of old forfeiture was of his estate. Thus it has been said: "A bill of attainder may affect the life of an individual or may confiscate his property or both. It touches in no way the question of the maxims referred to or anything that may bar an offender from becoming an heir or a beneficiary under will or contract."[20a]

Furthermore, attainder only arises out of conviction of an offense, but the principle involved cares nothing about conviction for a wrong, but only about the wrong itself. This question was alluded to in the Ellerson case *supra*. If conviction is a condition precedent to invoking the doctrine, those who assert it are interpolating a condition to its application, which seems not required in any of the insurance cases where a beneficiary is deprived of his benefit under the policy of insurance, nor in suicide cases, and was necessary only in the Burt case, because insured's life could not otherwise be taken away. The wrong, however, by a beneficiary murdering the assured is precisely the same kind of wrong as of a legatee murdering a testator or a prospective heir murdering an intestate.

Statutes as Determining Policy of Law.—Riggs v. Palmer and Walden v. City of Jamestown *supra*, expressed a rule on this subject and cases I am now to cite distinguish, or attempt to distinguish, between statutes and contracts by authority of law. A Kansas case,[21] which involved the question of a husband murderer of his wife inheriting from his wife, presents this question fairly.

It was said: "There is a manifest difference between private grants, conveyances and contracts of individuals and a public act of the legislature. It might be that a person would not be permitted to avail him-tion or enforcement of a grant or contract of a private person which would have no application or bearing on a statute enacted by the legislature. So far as descent of property is concerned, the courts are practically unanimous in holding that all the power and responsibility rest with the legislature. They have spoken with one voice in opposition to the exclusion of an heir from taking an estate on account of crime, where the statute in plain terms designates him as one entitled to inherit." There is then cited the Owens and Carpenter cases *supra.* The first of these cited no authority and the other relied on the Pennsylvania Constitution forbidding attainder. There were also cited cases in note hereto,[22] and the Riggs case is *another* voice on this subject.

The former of these cases was affirmed without opinion by Ohio Supreme Court, and the latter was the overruling of a prior decision in which two of the former bench joined with an incoming judge in reversing an unanimous opinion. This case relied on a Kentucky case,[23] which stated as a general principle of law that: "When the law is clear and explicit and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative, and not judicial, action." But the word "evil" may not be taken in a moral sense or an absurd sense.

As showing how far away from the real question is there allusion to such general principle as this excerpt contains is the reference to a New York case[24] for a similar statement, when that state has reaffirmed Riggs v. Palmer over and over again.

If a statute is the beginning and end of public policy, let me ask, if it would be allowable for a statute to grant to insurance companies the power to issue a policy payable upon condition that a beneficiary shall take by the murder of an assured, or that a beneficiary shall take upon an assured being convicted and executed for the murder of another? I think such a statute would be unconstitutional. Further, would a statute be constitutional which provided that if an ancestor were murdered, his male children should inherit, and if he died a natural death his daughters should inherit? Or would any statute be constitutional, which directly encouraged the murder of an ancestor? If the statute could not lawfully embrace such a condition, why should its plainness be conceived to embrace it? How does the lack of ambiguity figure in the matter at all, except as to things a statute lawfully may include or they be deemed excluded?

Statutes in Derogation of Common Law.—A Missouri case[25] holds that one who murders an owner of property cannot inherit from him and in approving of the doctrine of Riggs v. Palmer gives a very interesting reason, as follows: "These maxims of the common law are expressly made a part of our laws by the statute of this state, first adopted in 1816. They are a part of the law of the state by force of section 4151, R. S. 1899, unless they have been repealed, modified, changed or wiped out by statute law. Have we by statute either expressly or impliedly changed or modified the maxims discussed in the Tennessee and New York cases, *supra*? Has the common law in this respect been repealed, changed or modified? We think not. If not, they are a part of our law. If not, then this statute must be read in connection therewith, and when so read the father of appellees acquired no interest in the estate in controversy and appellees have none. Statutes in derogation of the common law are to be strictly construed, unless as in some states there is a statutory provision to the

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(22) Deem v. Millikin, 6 Ohio C. C. 357; Shel-

ers. The trouble about the Tennessee case[26] is that it dissented from the Riggs-Palmer case, but held the maxims applied so far as succession was controlled by the rule at common law. It seemed to hold that it did not apply the rule to statutes, though in derogation of common law.

Conclusion.—I would like to discuss many suggestive things in these cases I have been considering, but it appears to me, that nothing greatly interfering with the reasoning in Riggs v. Palmer has appeared in the cases which oppose it. I think the suggestion in the Missouri case is quite pertinent, but independently of that it appears to me that the maxims referred to stand on constitutional ground, and ignoring them, in matters as to which legislatures have control by statute, might work an injustice to others than those whose statutory rights they may fix. For example, the legislature can do nothing to bring about the death of a testator or an intestate directly, in favor of his devisees or heirs, and what it cannot do directly, it may not by indirection accomplish, e. g., by failure to provide against his loss of life, if such failure has a tendency to bring such a loss about.

N. C. COLLIER.

St. Louis.

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[26] Box v. Lanier, 112 Tenn. 373, 79 S. W. 1042, 64 L. R. A. 458.

MASTER AND SERVANT—RELIEF DEPARTMENT.

HERRING v. ATLANTIC COAST LINE R. CO.

Supreme Court of North Carolina. April 7, 1915.

84 S. E. 863.

Payment to an injured employe of benefits from a relief fund maintained by the employer does not bar a recovery for the injury, where the employe was compelled to enter the relief department, and the employer paying the benefits was entitled only to a credit therefor, for a contract to accept benefits in full is invalid.

Brown and Walker, J. J., dissenting.

mington. While there are some exceptions to the evidence, and to the charge, they do not require serious consideration. The appeal substantially rests upon the defense that the plaintiff was a member of the defendant's relief department, and that, having received benefits thereunder, he is estopped to maintain this action. The jury find that the plaintiff was injured by the negligence of the defendant, that he was not guilty of contributory negligence, and that he received $146 of benefits under the relief department which should be deducted from the $5,000 damages as found by the jury, and the court rendered judgment accordingly for $4,854.

The evidence and the charge excepted to come within the ruling of this court in King v. Railroad, 157 N. C. 44, 72 S. E. 801, 48 L. R. A. (N. S.) 450, and the cause was tried by the learned judge below, strictly in accordance with that decision. It will serve no purpose to review and elaborate that case. The plaintiff was compelled, according to the rules of the defendant company then in force, to enter the relief department, and, in taking the benefits that were paid him, the defendant became entitled to no more than a credit therefor. The gross inadequacy of such benefits, $146, as compared with the extent of his injuries, $5,000, certainly, when taken in connection with the evidence in the case and the charge, is conclusive of the plaintiff's right to maintain this action and to sustain this recovery.

In Railroad v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, and Railroad v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911, it was held that the contracts of these relief departments are invalid, beyond being a payment on account. In paragraphs 2 and 3 of the complaint, being taken in connection with the answer of the defendant to those two paragraphs, it is admitted that the defendant was engaged in interstate commerce. It is unnecessary to go into the question as to the particular service in which the plaintiff was engaged at the time, shifting cars, whether any of the cars were destined for points beyond the state, as in Railroad v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, and other cases cited in Ingle v. Railroad, 167 N. C. 640, 83 S. E. 744.

The United States Supreme Court, in cases above cited, held that the relief department contracts, even where the employes entered therein willingly, were invalid by virtue of the

fendant were compelled to enter the relief department. It is not necessary to consider whether the decision of this court in Barden v. Railroad, 152 N. C. 318, 67 S. E. 971, 49 L. R. A. (N. S.) 801, in which we held that such contracts were invalid, shall now be reinstated. For taking King v. Railroad, supra, as still in force in every respect, this case has been tried in accordance therewith, and the verdict and judgment are fully sustained by it. Besides, we learn that the defendant company, in consequence of the decision of the United States Supreme Court in McGuire's and Schubert's Cases, above cited, have now abandoned the operation of their relief department as a defense to actions by employes for damages sustained from the negligence of the company or of fellow servants of the injured employe.

No error.

BROWN, J. I am constrained to dissent from the conclusion reached by the court in this case for the reasons given in my dissenting opinion in Barden v. Railroad Co., 152 N. C. 318, 67 S. E. 971, 49 L. R. A. (N. S.) 801, and also in my opinion in King v. Railroad, 157 N. C. 44, 72 S. E. 801, 48 L. R. A. (N. S.) 450.

I see no evidence whatever in this case of fraud and undue influence, which brings the case within the principle laid down by the majority of the court in the King Case. There is no evidence that the plaintiff was injured while engaged in interstate commerce; certainly there is no finding of fact to that effect. Therefore the provisions of the federal act invalidating relief department contracts have no application. Neither has a similar act enacted by the legislature of this state, for the reason that the injury occurred before the ratification of the act.

This whole question has been fully discussed in the cases I have cited; and, as they cannot well arise in the future, it is useless to discuss this matter any further.

WALKER, J., concurred in this opinion.

NOTE.—*Validity of Statutes Forbidding Contracts by Railroads from Release from Liability to Employees.*—The instant case appears to dwell on the fact, that employees were compelled to join the relief department of the railroad, but as we read the cases in which such legislation as that in North Carolina has been sustained it was valid independently of any such circumstance they did not contemplate exemptions from liability as where benefits were accepted, but this contention was overruled.

The McGuire case was considered in 131 Iowa 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706, two out of five judges dissenting. It declared in addition to the statute not being invalid under the 14th Amendment, that it came within a state's police power and applied as well to foreign and domestic corporations doing business in the state. It was affirmed in Railroad v. McGuire, *supra.*

In Washington v. Atlantic Coast Line R. Co., 136 Ga. 638, 71 S. E. 1066, 38 L. R. A. (N. S.), the validity of a Georgia statute to the same effect as the Iowa statute and to that part of the Federal Employers' Liability Act referred to in the Schubert case, *supra,* was sustained. Judge Lumpkin carefully considered the question with reference to the provision of the state constitution against the validity of any law impairing the obligation of contracts, it being similar to the same provision in the federal constitution. The state's police power was held to override this, so far as intent not being to circumscribe that power was concerned.

As cognate to the question involved is Opinion of Justices, 209 Mass. 607, 96 N. E. 308, that a workmen's compensation act could provide that no agreement by an employee to waive his rights to compensation under the act should be valid, and to the same effect is the ruling in Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

Many cases, in the absence of statute condemning such arrangement as a railroad's relief department, sustain it as within lawful policy, there being a long line of such cases cited in the opinion of the majority of the court. But as these cases were decided prior to the enactment of Federal Employers' Liability Act, it would seem other states than Georgia, North Carolina and Iowa ought to legislate so as to conform to the national act on this subject.

We also find the Appellate Court of Indiana in line with the other states, which have passed on the constitutionality of this legislation, though the question of constitutionality was not raised, the only question being whether it embraced relief association agreements. Wells v. Vandalia R. Co., 103 N. E. 360.

In Lawson v. Halifax-Tonopah Min. Co., 36 Nev. 591, 135 Pac. 611, the constitutionality of a similar statute was upheld, the case referring to McGuire case as decided by Supreme Court of Iowa and affirmed by U. S. Supreme Court, it being said that if the Iowa statute is valid, which makes provision for settlement of damages subsequent to injury, so much more may be thought valid legislation to prevent an individual entering into a contract in advance of injury. It is said to be within police power to prevent con-count without there being any more variance as to the law applicable in the one or the other case than is absolutely necessary. It has been decided that suits may be so brought. 79 Cent. L. J. 37, citing Wabash R. Co. v. Hayes, 34 Sup. Ct. 729.

C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS FOR 1915—WHEN AND WHERE TO BE HELD.

Alabama—Montgomery, July 9 and 10.
Arkansas—Ft. Smith, June 1 and 2.
Florida—Atlantic Beach, July 23 and 24.
Georgia—St. Simon's Island, June 3, 4 and 5.
Illinois—Quincy, June 11 and 12.
Iowa—Ft. Dodge, June 24 and 25.
Kentucky, Frankfort, July 8 and 9.
Maryland—Cape May, N. J., July 7, 8 and 9.
Montana—Billings, August 13, 14 and 15.
New Jersey—Atlantic City, June 11 and 12.
North Carolina—Asheville, August 2, 3 and 4.
Ohio—Cedar Point, July 6, 7 and 8.
Pennsylvania—Cape May, N. J., June 29, 30 and July 1.
Tennessee—Chattanooga, June 24 and 25.
Texas—San Antonio, July 1, 2 and 3.
Wisconsin—Superior, July 14, 15 and 16.

CORRESPONDENCE

MAILING LETTER AS DETERMINATIVE OF PLACE OF DELIVERY OF CONTRACT.

Editor Central Law Journal:

In reading your interesting article, "Mailing a Letter as Determinative of Place of Delivery of a Contract," in 80 C. L. J. 232, I am led to inquire if the rules of the United States regarding recall of letters, viz: Rule 553, which provides that a letter may be recalled after being dispatched from the mailing office, up to the time of its delivery to the person to whom addressed (upon the sender's bearing all the expenses of telegrams, etc.) would not have a bearing on the point under discussion?

Under the above rule if the wife (in Florida) had chosen, she could have had the letter recalled up to the moment before it was delivered to Charles H. Tobey, trustee, at his Illinois address. This being true, it seems it must be true that the delivery was not com-

deposited the note and trust deeds in the postoffice she "lost all control over the papers and all right to retake and redeem them." If mail matter is under control of a sender this control lasts until it is released to an addressee at the place of his address, and there, and not the place from which it is sent, is the place of delivery. Rule 553, of which our correspondent speaks, is referred to in 9 Cyc. 297, as follows: "In the English cases it is always assumed that the letter on being posted is beyond the control of the sender—that it becomes the property of the addressee as soon as it is put into the mail. Within a few years the regulations of the United States postoffice have been altered and the writer or sender may apply for a letter he has put in the mail and when properly identified the postmaster must return it to him or telegraph to the office of the addressee whose postmaster must return it to the mailing postmaster, if it has not been delivered. The question then will arise, whether a change in the regulations of the postoffice can affect the law that the acceptance is final when the letter is dropped in the postoffice. It seems that it does." There is then cited an English case in reference to a letter posted in France which country had a regulation authorizing sender to recall it from the mailing office, and Mellish, L. J., said: "I am inclined to think that the effect of that rule is that the postoffice is the agent of the sender of the letter until it leaves the town and that the indorsement of the bills contained in it is not complete till the letter is dispatched from the town." Ex parte Cote, L. R. 9 Ch. 27, 31, 43 L. J. Bankr. 19.

We thank our correspondent for his kindly letter. This regulation but enforces the other views advocated in our article and makes of our mails an agency that is controlled by a user thereof as completely as any private agency selected by him. EDITOR.

NEED OF CERTAINTY IN A CRIMINAL STATUTE.

Editor Central Law Journal:

I read with much interest and instruction the editorial article, entitled, "The Need of Certainty in a Criminal Statute to Make it Constitutional," in No. 16, of Vol. 80, of the Journal.

The Arkansas Supreme Court, at its May term, 1885, in the case of Andrew Jackson, ex parte, announced the same principles stated in the editorial. The history of the case is interesting. The court said, (45 Ark. 164):

"We cannot conceive how a crime can, on any sound principle be defined in so vague a null. The constitution, which forbids *ex post facto* laws, could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed.

Newport, Ark. S. D. CAMPBELL.

BOOK REVIEW

BORLAND ON WILLS AND ADMINISTRATION.

This work is an enlarged edition of a publication by the author of lectures delivered by him to the senior class of the Kansas City School of Law, which publication met with so much favor that he concluded to revise and extend it so as to make a text-book.

The book should be of especial value to the Western lawyer as it embraces the rules of common and statute law in the states of Missouri, Kansas, Texas, Oklahoma, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada and California. In addition there are cited cases in the federal courts and of the District of Columbia, which bear on the question.

The prime purpose of this work is to harmonize decisions as far as possible and present rules of law in concrete shape for practical administrative purposes, without however derogating from the task of setting forth legal principles on so abstruse a subject.

The text of the author is clear and cogent and his propositions are abundantly supported by authority, and the subject itself is treated in logical sequence, to the end of producing a readily useful work of advantage both to practitioner and student.

The book is in law buckram, in one volume of more than 600 pages and is published by the well known house of Vernon Law Book Company, Kansas City, Mo., 1915.

BOOKS RECEIVED

The Law of Electricity, including Electrolysis, Electrical Injuries, Powers, Duties and Regulation of Electrical Companies, Eminent Domain, Taxation, Electrical Contracts, Municipal Ownership Abutting Owners. Interfer-

HUMOR OF THE LAW.

Vice-President Marshall was talking about his legal career. "I never was much of a lawyer," he declared, "but I've always had a certain facility in making the most of the legal material at hand. If somebody would just bring me the bricks, I could pick them up and throw them."—St. Louis Globe-Democrat.

A celebrated barrister undertook a trade-mark suit that looked hopeless for his client. The client went abroad, leaving his telegraphic address, with instructions that he was to be notified of the decision. He won the case, and the barrister cabled, "Justice has triumphed." The client wired back, "Lodge immediate appeal!"

L. H. Klugherz relates in The Docket that the following was overheard in one of the New York municipal courts recently:

"The case of Flaherty v. Cohen was called for trial. A big Irishman arose and shouted, 'Ridy for th' d'findint.' 'Where's the plaintiff?' asked the court. 'Shure, I'm the plaintiff,' said the Irishman. 'Then why do you answer 'Ready for the defendant?' 'B'cause, y'r Honer,' said Flaherty, 'I am ridy for the d'findint. If he shows up, I'll knock his block off.'"

Needless to relate the defendant failed to appear.

A tailor of Philadelphia, who had engaged the services of a lawyer in the prosecution of a suit against a customer, was much put out by the size of the bill rendered him by the legal luminary.

Later in the year, however, an opportunity for getting even presented itself to the tailor. When the suit the lawyer had purchased had been found satisfactory and delivered, the tailor sent him a bill in these legal terms:

"To measuring and taking order for one suit, $4.50; warrant and instructions to foreman for executing same, $3.35; going twice to cloth merchant, $2.25; fees to cloth merchant, $25; cutting the cloth, $8.75; materials for working, $5.50; sundries for working, $9; trying on the suit, $2.75; alterations and amend-

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

Arkansas	23, 42, 57, 64, 65, 66, 85, 86, 91
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1. **Adultery**—Defined.—Under P. S. 5881, construed with reference to section 5882, a single man who has unlawful intercourse with a married woman is guilty of adultery.—State v. Bigelow, Vt., 92 Atl. 978.

2.——Illicit Intercourse.—Acts of illicit intercourse do not constitute the offense of living in adultery, which is living together as husband and wife by the unmarried.—People v. King, Cal., 146 Pac. 51.

3. **Alteration of Instruments**—Presumption.—Where the notes introduced are in the same condition as they appear in the complaint, and defendant's answer admits execution and delivery, it will be presumed that any alteration was made prior to execution of the notes.—Exchange State Bank v. Taber, Idaho, 145 Pac. 1090.

4. **Assignments** — Evidence. — Where the pleadings raised as an issue of fact the right of a corporation to maintain the action after voluntary dissolution, evidence of the assignment of its claims was admissible on that issue to show that the action was for the benefit of the assignee.—St. Albans Granite Co. v. Elwell

Larkin-Green Logging Co., U. S. D. C., 218 Fed. 984.

6.——Discharge.—Bankrupt's failure to apply for a discharge in a prior proceeding held res judicata, barring discharge from debts scheduled in such proceeding, in a subsequent bankruptcy proceeding more than six years thereafter.—Siebert v. Dahlberg, U. S. C. C. A., 218 Fed. 793.

7.——Fraud.—Where the conveyance of a bankrupt is attacked as in fraud of creditors, his grantee may plead limitations as a defense to the bankrupt's liabilities existing antecedently to the conveyance.—Pace's Trustee v. Pace, Ky., 172 S. W. 925.

8.——Lien,—Selling agents for a bankrupt manufacturing company on commission held not entitled to a lien for their services as "workmen, laborers or other persons performing labor" by contract, under Code W. Va. 1913, c. 75, § 7 (sec. 3848).—In re Crawford Wollen Co., U. S. D. C., 218 Fed. 951.

9.——Liens.—The Bankruptcy Act as it existed in February, 1903, did not create lien in favor of creditors becoming such after giving of chattel mortgage by bankrupt, and before filing of same.—Detroit Trust Co. v. Pontiac Sav. Bank, 35 Sup. Ct. Rep. 509.

10.——Preference.—Payment of note by corporation within four months before bankruptcy held to give guarantor on the note a preference, precluding proof by him of another claim, unless he returned the preferential payment.—In re W. A. Silvernail Co., U. S. D. C., 218 Fed. 979.

11.——Preference.—Except as prohibited by the Bankruptcy Act, a husband may legally prefer his wife as a creditor, in the absence of fraud, actual or constructive, to which she is a party.—Weld v. McKay, U. S. C. C. A., 218 Fed. 807.

12.——Provable Claim.—Fertilizer company, by whose contract with dealer there was no sale until a settlement, and customers' accounts were to be turned over to it, held to have lost its right to such accounts by its course of dealing, bankruptcy having intervened.—In re Handy, U. S. D. C., 218 Fed. 956.

13.——Referee.—Subject to the exercise of his discretion in controlling irrelevant inquiries, it is good practice for a referee to receive testimony to which objection is made.—In re Krug, U. S. D. C., 218 Fed. 860.

14. **Banks and Banking**—Assessment.—The Comptroller of the Currency having levied an assessment of 100 per cent on the stock of an insolvent bank, such a levy was not vacated by a letter approving a sale of the bank's bonds, and stating that such sale would probably make an assessment unnecessary.—Pepper v. Springfield Institution for Savings, U. S. C. C. A., 218 Fed. 814.

15.——Bank Commission.—A bank commis-

16.——Set-off.—Where the indorser of a note was primarily liable thereon, and procured its discount by his bank for his own benefit, he was entitled on the failure of the bank to set off his deposit account against his liability on the note in a suit by the bank's receiver.—Williams v. Rose, U. S. D. C., 218 Fed. 898.

17.——Usage.—The authority of a cashier to compromise or discharge debts due the bank, without payment or receipt of other securities, must be shown by implication or usage, or there must have been a ratification by bank.—Citizens' Bank of Tifton v. Timmons, Ga., 84 S. E. 282.

18. **Bills and Notes**—Certified Check.—The certification of a check at request of the holder relieves the drawer; the certification being equivalent to an acceptance, under Negotiable Instruments Law, § 324.—Carnegie Trust Co. v. First Nat. Bank of City of New York, N. Y., 107 N. E. 693.

19.——Evidence.—Whether testimony tending to show a valid defense to the note sued overcomes the presumption created by introduction of the note in evidence is for the jury, though the evidence in rebuttal is uncontradicted.—Citizens' Bank of Tifton v. Timmons, Ga., 84 S. E. 232.

20. **Breach of Marriage Promise**—Bad Character.—A defendant in an action for breach of marriage promise may, under the general issue, show the bad character of plaintiff, as bearing on the amount of the recovery.—Gerlinger v. Frank, Ore., 145 Pac. 1069.

21. **Brokers**—Commissions.—A broker held not entitled to commissions, where the contract of the purchaser was an option to purchase or forfeit earnest money; the purchaser having elected not to complete the purchase.—Scott v. Merrill's Estate, Ore., 146 Pac. 99.

22. **Carriers of Goods**—Damages.—The damages for loss of a shipment may be determined with reasonable certainty by deducting the freight and cost of converting the commodity into cash from its value at destination.—Lamb v. W. H. Mitchell & Co., Ga., 84 S. E. 213.

23.——Notification.—Where a seller, shipping goods to his order with directions to notify buyer, transferred the bill of lading to a bank and obtained credit therefor, the carrier could not deliver except on production of the bill of lading.—Tedford Auto Co. v. Chicago, R. I. & P. Ry. Co., Ark., 172 S. W. 1006.

24.——Public Policy.—A requirement that claims for loss or damage to an interstate shipment be made within ten days held not void as violative of public policy or for want of consideration.—W. H. Mitchell & Co. v. Atlantic Coast Line R. Co., Ga., 84 S. E. 227.

25. **Carriers of Live Stock**—28 Hour Load.—Under Act June 29, 1906, where live stock, after being confined in cars for more than 28 hours, is unloaded into inadequate and insufficiently equipped pens, this does not constitute a new and separate offense.—United States v. Oregon Short Line R. Co., U. S. D. C., 218 Fed. 868.

26.——Passenger.—One who boarded a street car intending to pay his fare became a passenger when he entered the car, which had stopped at a station.—Miller v. Pacific Electric Ry. Co., Cal., 145 Pac. 1023.

27.——Release.—Provision in contract by Pullman car porter releasing carriers from liability for injuries received in a collision due to carrier's negligence.—Robinson v. Baltimore & O. R. Co., 35 Sup. Ct. Rep. 491.

28.——Respondeat Superior.—The act of a motorman in inviting a boy nine years old to ride on a car is within the scope of his employment, and the street railway company is liable for his negligent operation of the car.—Solomon v. Public Service Ry. Co., N. J., 92 Atl. 942.

29. **Certiorari**—Intermeddler.—Hearing should be denied one as an intermeddler, on his petition, as next friend, for certiorari to quash a decree appointing a guardian of another, as a spendthrift; the ward testifying that it was without his knowledge, authority or desire.—Champlin v. Probate Court of Exeter, R. I., 92 Atl. 982.

30. **Chattel Mortgages**—Lien.—A lien on property covered by unfiled chattel mortgage was not created in favor of creditors of mortgagor becoming such after its execution, by Comp. Laws Mich. 1897, § 9523.—Detroit Trust Co. v. Pontiac Sav. Bank, 35 Sup. Ct. Rep. 509.

31.——Replevin.—Where a mortgagee procured possession before default, and the mortgagor brought replevin, and thereafter made default, defendant was entitled to judgment for the property, and plaintiff was entitled to damages for the usable value while the mortgagee unlawfully retained possession.—McDonald v. Schantz, Okla., 146 Pac. 36.

32. **Commerce**—Federal Employers' Liability Act.—Where a carrier's servant was injured while coupling an engine to a baggage car, the carrier was not liable under the Federal Employers' Liability Act, though it intended to incorporate in the train freight cars then in interstate commerce.—Atchison, Topeka & Santa Fe Railway Co. v. Pitts, Okla., 145 Pac. 1148.

33.——Intrastate Business.—A railroad company, whose road was used by a mill company for the transportation of logs from the timber lands in the state of Washington to Puget Sound, where they were sold or made into lumber for sale, held not engaged in interstate commerce, within the meaning of Employers' Liability Act, § 1.—Nordgard v. Marysville & N. Ry. Co., U. S. C. C. A, 218 Fed 737.

34.——Shipments.—Delivery for shipment in interstate commerce of citrus fruits unfit for consumption may be made a criminal offense, as is done by Laws Fla. 1911, c. 6236, under the police power of the state.—Sligh v. Kirkwood 35 Sup. Ct. Rep. 501.

35.——Stamp Tax.—The stamp tax imposed under Act June 13, 1898, on marine policies, held invalid as being a tax on exportation, in violation of Const. U. S. art. 1, § 9.—Thames & Mersey Marine Ins. Co. v. United States, 35 Sup. Ct. Rep. 496.

an ex post factor law, when applied to crimes previously committed.—Malloy v. State of South Carolina, 35 Sup. Ct. Rep. 507.

37.——Foreign Corporation.—A foreign insurance company having less than one-fourth of its reserve on South Carolina policies invested in South Carolina securities is not denied equal protection of laws, contrary to Const. U. S. Amend. 14, because state insurance commissioner, under Act S. C. March 8, 1910 (26 St. at Large, p. 774) § 13, has refused to accept bond of surety company unless it invests one-fourth of its reserve on South Carolina policies in South Carolina securities.—State of South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster, 35 Sup. Ct. Rep. 504.

38.——Fourteenth Amendment.—An ordinance passed under authority of the Legislature, making it unlawful to conduct a livery stable within a designated area, does not infringe on rights granted by the fourteenth amendment to the federal Constitution.—Reinman v. City of Little Rock, 35 Sup. Ct. Rep. 511.

39. **Contracts** — Consideration. — That the houses on which a loan is made to obtain money for improving them are to be used for illegal purposes does not destroy the consideration of the loan.—Mechanics' Realty & Improvement Co. v. Leva, Ga., 84 S. E. 222.

40.——Delegation of Power.—When parties to contract delegate to third person the decision of some undetermined matter, his decision, in the absence of fraud or gross mistake, is conclusive.—Frisco Lumber Co. v. Hodge, U. S. C. C. A., 218 Fed. 778.

41.——Delivery.—The presumption of delivery arising from possession of an instrument is less strong when applied to an executory contract than when applied to a deed.—Brown Bros. Lumber Co. v. Preston Mill Co., Wash., 145 Pac. 964.

42. **Criminal Law**—Suppression of Evidence.—A contract to suppress letters to be used in a criminal prosecution is illegal, but, if the letters are to be secured merely to prevent their being sent unlawfully to the wife of one hiring another to secure them, then the contract is good.—Josephs v. Briant, Ark., 172 S. W. 1002.

43. **Corporations** — Imputable Knowledge.—Knowledge acquired by officers or agents while not acting for a corporation, but for themselves, is not imputable to the corporation.—Roess Lumber Co. v. State Exch. Bank., Fla., 67 So. 188.

44.——Ratification.—Acceptance and retention of proceeds of a note executed by the president of a corporation, and acts tending to induce belief in his authority, are a ratification or acquiescence rendering the corporation liable on the note.—Williams v. S. M. Smith Insurance Agency, W. Va., 84 S. E. 235.

45.——Receiver.—Where a statutory receiver has been appointed for a corporation, a stockholder, with consent of the court appointing the receiver, can sue in equity for the benefit of the corporation and the receiver in a foreign jurisdiction for an injury to it.—Keny v. Dolan, U

47. **Courts**—Diversity of Citizenship.—Where a stockholder sued the corporation's statutory receiver of the same citizenship in a foreign federal court, together with individual defendants of diverse citizenship, the court, to sustain jurisdiction for diversity of citizenship, could realign the parties, making the receiver a complainant.—Kelly v. Dolan, U. S. D. C., 218 Fed. 966.

48.——Writ of Error.—Whether certain railway companies were at common law liable as forwarders of freight to connecting carriers outside the state, and whether they were jointly and severally liable, when determined by the highest state court, furnished no basis for writ of error to the Federal Supreme Court.—Eastern Ry. Co. of New Mexico v. Littlefield, 35 Sup. Ct. Rep. 489.

49. **Covenants**—Mistake of Law.—Where a bank receiver sold certain real property under a covenant against incumbrances, and it was afterwards determined that the title was subject to a judgment, the receiver was not relieved from liability on the theory that the breach arose from a mistake in matter of opinion or law.—White v. Murray, U. S. D. C., 218 Fed. 933.

50. **Criminal Law**—Accomplice.—In the federal courts the testimony of an accomplice need not be corroborated, though it should be received with caution, and not taken as that of an ordinary witness of good character.—Lung v. United States, U. S. C. C. A., 218 Fed. 817.

51.——Continuance.—Accused should be granted a continuance upon a showing that she was so ill that she would be unable to be present at her trial.—Johnson v. State, Miss., 67 So. 177.

52.——Plea in Abatement.—The title of a presiding judge to his office cannot be questioned by a plea in abatement to an indictment.—Davis v. State, Miss., 67 So. 178.

53. **Death**—Pleading.—A declaration, in an administrator's action for wrongful death, is demurrable, where it fails to aver plaintiff's appointment and qualification.—Neil v. West Virginia Timber Co., W. Va., 84 S. E. 239.

54. **Descent and Distribution** — Expectant Heir.—A sale by an expectant heir of an interest in land which he expects to inherit from a person then living is not against public policy.—Blackwell v. Harrelson, S. C., 84 S. E. 233.

55. **Divorce**—Failure to Support.—Where a wife was not in need of the support of her husband, and he was unable to support himself, his failure to contribute to support of her and their daughter after she abandoned him was not "gross neglect of duty," under Rev. Laws 1910, § 4962.—Beauchamp v. Beauchamp, Okla., 146 Pac. 30.

56.——Vacation of Decree.—A decree of divorce will be vacated for fraud of the successful party making false statement in his petition and affidavit as to the residence of the parties.—De Souza v. De Souza, R. I., 92 Atl. 983.

57. **Dower**—New Acquisition.—Where a husband who inherited an undivided interest in lands purchased the interest of his coheir, such purchase constituted a new acquisition in which his wife was entitled to dower in fee.—Barton v. Wilson, Ark., 172 S. W. 1032.

58. **Drains**—Special Assessment.—That part of the expense of constructing a drainage ditch which is assessed against a county for draining highways cannot be paid from funds collected by special assessments against property owners.—Wilkins v. Hillman, Okla., 145 Pac. 1111.

59. **Estoppel**—Personal Liability. — Where plaintiff proved a note against a bankrupt corporation, he is estopped to claim that the president had no authority to execute the note, and hence was personally liable.—New England Electric Co. v. Shook, Colo., 145 Pac. 1002.

60. **Executors and Administrators**—Estoppel.

61.——State Demand.—A delay of 15 years without taking any steps to enforce payment of claims held to justify the county court sitting in probate to adjudge the claims state demands against the estate of the deceased debtor.—In re Webster's Estate, Ore., 145 Pac. 1063.

62. **Fraud, Statute of**—Consideration.—Where persons paying a valuable consideration for a road pursuant to a parol contract therefor used the road undisturbed for more than 15 years under a claim of right, they acquired an indefeasible right to it.—Oak Grove Missionary Baptist Church v. Rice, Ky., 172 S. W. 927.

63. **Fraudulent Conveyances** — Bulk Sales Act.—Where a transferor complies with the Bulk Sales Act, except that the notice is signed by him, and not the transferees, a resident creditor receiving such notice and assenting to the sales waives any right to attach the goods for failure to comply with the statute.—First Bank of Texola v. Terrell, Okla., 145 Pac. 1140.

64. **Homestead**—Occupancy.—A wife's homestead right is derived from the fact that real estate is the homestead of her husband and depends on the continued occupancy thereof as a homestead.—Brignardello v. Cooper, Ark., 172 S. W. 1030.

65. **Homicide**—Bringing on Combat.—Person provoking, or inviting, attack, or bringing on combat, held not justified in killing until he has withdrawn from the combat as far as he can and done all in his power to avoid the danger and avert the necessity of killing.—Lee v. State, Ark., 172 S. W. 1025.

66.——Self Defense.—The danger need not be so urgent that the killing was necessary to save defendant's life or to prevent great bodily harm, but defendant need only honestly believe it was necessary.—Tiner v. State, Ark., 172 S. W. 1010.

67. **Husband and Wife**—Agency.—A wife, having indorsed her husband's note for his accommodation, for no benefit accruing to her, in a transaction in which he did not act as her authorized agent, held not liable thereon.—Schmid v. Spicer, Del., 92 Atl. 991.

68.——Agency.—A wife, permitting her husband to do business generally in her name, may impliedly authorize him to sign her name to notes, for which she will be bound.—Highland v. Ice, W. Va., 84 S. E. 252.

69.——Homestead.—Where a homstead incumbered by a mortgage executed by the husband alone, was conveyed by husband and wife to a third person who reconveyed it to them jointly, a note subsequently executed by the wife to the mortgagee held not binding on her—First Nat. Bank of Montpelier v. Bertoli, Vt., 92 Atl. 970.

70. **Indians**—Allotment.—That a patent had not been issued for the allotments of a Creek freedman, from which the restriction was removed by Act Cong. April 21, 1904, and Act. Cong. May 27, 1908, held not a bar to alienation by the allottee subsequent to the taking effect of such acts.—Benadum v, Armstrong, Okla., 146 Pac. 34.

71. **Insurance**—Accident.—Where insurer was liable under one provision for death from violent "or" accidental means, that an independent provision state a different liability for death from violent "and" accidental means did not relieve it where death was from a shot not accidental.—Oklahoma National Life Insurance Co. v. Norton, Okla., 145 Pac. 1138.

72.——Proof of Loss.—Where insured in good faith attempts to make proper proof of loss, and the insurer fails to object to the proof within the time when proper proof may be made, the insurer is estopped to subsequently object thereto.—Liverpool & London & Globe Ins. Co. v. Cargill, Okla., 145 Pac. 1134.

73. **Internal Revenue**—Corporation Tax Law. place where intoxicating liquors are kept for sale, barter, or exchange or habitual giving away as a beverage in connection with any other business conducted in such place.—State v. Quinn, La., 67 So. 206.

75.——Unlawful Retailer.—Though accused purchased liquor as agent for a third person, he is guilty of the unlawful retailing, where the purchase and delivery were made in a town where the sale of liquor was prohibited.—Pope v. State, Miss., 67 So. 177.

76. **Judgment**—Default.—A default judgment against abstractors was properly set aside, where it included the amount of a lien not disclosed by the abstract, but previously held invalid by a final judgment of which plaintiff alone knew.—Walker v. Bowman, Okla., 145 Pac. 1130.

77. **Landlord and Tenant**—Lessee.—That the leased office, about a year after being rented, was rendered untenantable by offensive odors from food brought in by rats, held not to relieve the tenant from his obligation to pay rent, where the landlord did everything in his power to abate the odor.—Lumpkin v. Provident Loan Society, Ga., 84 S. E. 216.

78.——Money Paid.—Where defendant, by unenforceable verbal agreement, contracted to lease premises, a sum of money paid him as a deposit cannot be recovered, in an action on the agreement to lease.—Vasik v. Speese, Cal., 146 Pac. 61.

79.——Negligence.—A landlord repairing the roof of the building pursuant to the tenant's requests held liable for negligence in leaving the roof in a defective condition without notifying the tenant.—Ara v. Rutland, Tex., 172 S. W. 993.

80. **Malicious Prosecution**—Probable Cause.—The act of bona fide creditors in filing a petition in bankruptcy, where they had reasonable grounds and acted on legal advice, held not to give a right of action for damages, though the petitioners were unsuccessful.—Harvey v. Gartner, La., 67 So. 197.

81. **Master and Servant**—Accident.—A rupture caused by a strain while at work is an "accident or untoward event arising in the course of employment" and compensable under the Workmen's Compensation Act.—Poccardi v. Public Service Commission, W. Va., 84 S. E. 242.

82.——Ordinary Care.—Evidence that no person had ever adopted a different method of demolishing a wall than that used by defendant when plaintiff was injured held not to show that defendant used ordinary care to adopt a safe method.—Gordon Jones Construction Co. v. Lopez, Tex., 172 S. W. 987.

83. **Mines and Minerals**—Statutory Construction.—Rev. Codes, § 8535, declaring a penalty for leaving unguarded a shaft, drift, or cut, is not extended by implication to any kind of a ditch more than ten feet deep, by the exception of mining, irrigating and other ditches, not more than such depth.—McLaughlin v. Bardsen, Mont., 145 Pac. 954.

84. **Mortgages**—Attorney Fees.—A recital in a mortgage that a mortgagor would pay "—— per cent as attorney's fees," held not to authorize allowance of reasonable attorney's fees.—Oklahoma City Development Co. v. Picard, Okla., 146 Pac. 31.

85.——Foreclosure.—In a suit to foreclose a mortgage executed by a husband alone on his homestead, his wife is not a necessary party, except to bar her inchoate right of dower.—Brignardello v. Cooper, Ark., 172 S. W. 1030.

86. **Municipal Corporations** — Improvement District.—Under an ordinance creating an improvement district to lay concrete sidewalks on either or both sides of all public streets in the town, the board of improvement cannot lay sidewalks on only some of the streets of the town.— S. W. 1013.

88.——Street Lamps.—Where contract for furnishing street lamps provided that tests of illuminating power upon which deductions in price were to be based should be made with the globe removed, held that deductions could not be based on tests made without removing the globe.—City of Philadelphia v. Welsbach Street Lighting Co. of America, U. S. C. C. A., 218 Fed. 721.

89. **Navigable Waters**—Accretion.—In the absence of assertion of title by the government, extension of land of an island along a slough by pumping of sand therein by the government in dredging another channel held to accrue to the shore owners as accretion.—Gillihan v. Cieloha, Ore., 145 Pac. 1061.

90. **Negligence**—Driver of Vehicles.—A driver of an automobile held not guilty of actionable negligence in that a mule hitched to a wagon standing near the side of a street became frightened and ran away.—Shelton v. Hunter, Ky., 172 S. W. 950.

91. **Nuisance**—Liverty Stable.—A stable is not necessarily a "private nuisance," although if it is not kept clean or is used as a breeding stable, it is a nuisance.—Jackson v. Columbia County & Southwestern Fair Ass'n, Ark., 172 S. W. 1035.

92. **Partition**—Expectant Heir.—Where expectant heir conveyed interest to another heir, partition agreement held not to reinvest him with title which when acquired passed under his deed, nor to estop his grantee from claiming the entire tract allotted to her and the grantor. —Blackwell v. Harrelson, S. C., 84 S. E. 233.

93. **Partnership**—Construction of Law.—Rev. Laws 1910, § 2700, relating to use of firm names held not to apply to an individual doing business in Ohio under the name of the Continental Jewelry Company, and taking orders in Oklahoma, to be accepted in Ohio, for goods to be delivered in Ohio.—Bixley v. Sharp, Okla., 146 Pac. 21.

94. **Pleading**—Judgment.—The facts averred in one paragraph of the answer being sufficient to defeat the action, a judgment for defendant was proper, though his cross-complaint and other paragraphs of the answer were insufficient, where complainant stood on his demurrers when overruled.—Williams v. Wood, Ind., 107 N. E. 683.

95. **Post Office**—Scheme to Defraud.—A use of the mails in furtherance of a scheme to defraud, in order to sustain an indictment, need not be a scheme definitely devised in the first instance with respect to the particular instruments of fraud and the particular proposed victims.—United States v. Farmer, U. S. D. C., 218 Fed. 929.

96. **Prostitution**—Inmate of House of.—A woman who visited a house of prostitution on three occasions and there had intercourse with men, held to be an inmate of a house within St. 1911, p. 9.—People v. Jan You, Cal., 146 Pac. 63.

97. **Receivers**—Trust Fund.—Premiums on insurance policies collected by the receiver of an insolvent soliciting agent constitute a trust fund for the insurers, to the exclusion of general creditors, except as to the surplus.—Williams v. S. M. Smith Ins. Agency, W. Va., 84 S. E. 235.

98. **Religious Societies**—Waiver.—Members of a congregation of the Cumberland Church, by continuing their relations as members and officers for six months after union of the church, with apparent approval, held to waive rights to question its legality and claim possession of church property.—Hayes v. Manning, Mo., 172 S. W. 897.

99. **Replevin**—Title.—In claim and delivery to recover personality held by warehousemen, the successors to the business, as well as the one whom the warehousemen asserted was an owner, are necessary parties.—Fapp v. McQuillan, Nev., 145 Pac. 962.

100. **Sales—Warranty.**—Where an engine of the buyer is known to be intended for use with

Mianus Motor Works v. Vollans, Wash., 145 Pac. 997.

101. **Shipping**—Inspection of Appliances.—Where a stevedore was injured by the breaking of a defective sling rope used in unloading a vessel and the defects could have been discovered by inspection, a finding of actionable negligence on the part of the vessel was justified.—Story v. Evans, U. S. C. C. A., 218 Fed. 620.

102. **Trade Marks and Trade Names**—Simulation.—The deceiving or probable deceiving of the ordinary purchaser is an indispensable basis of a cause of action for simulating the product of one party by that of another.—A. Leschen & Sons Rope Co. v. Fuller, U. S. C. C. A., 218 Fed. 786.

103. **Trusts**—Beneficiary.—Beneficiary agreeing with the testator to make a certain disposition of property will be declared a trustee, but the testator's intention must be communicated to the legatee, the legatee must assent thereto, and the testator must act upon the assent.—Nash v. Bremner, N. J., 92 Atl. 938.

104.——Evidence.—A resulting trust will not be established in favor of one heir as against heirs seeking partition, where the trustee ancestor has been dead many years, and the evidence to establish such trust is not convincing beyond a reasonable doubt.—Evans v. Johnson, Fla., 67 So. 190.

105. **Vendor and Purchaser**—Estoppel.—Where a vendor gave the purchaser a reasonable time to accept an offer before withdrawing it, it is not estopped from refusing to perform because the purchaser had bought land to enable him to accept the offer.—Brown Bros. Lumber Co. v. Preston Mill Co., Wash., 145 Pac. 964.

106.——Notice.—Where a landowner executed an absolute deed to secure a loan and remained in possession, and the land was subsequently conveyed by the grantee to two persons, one with knowledge of the character of the former deed, both were chargeable with notice.—Williams v. Purcell, Okla., 145 Pac. 1151.

107. **Waters and Water Courses**—Demand for Service.—A consumer of water cannot demand service as a right when he rufuses to pay a bill for previous service, even though he in good faith believes the charge exorbitant and open to dispute.—Louisville Tobacco Warehouse Co. v. Louisville Water Co., Ky., 172 S. W. 928.

108.——Jurisdiction.—The Legislature had power to enact Comp. Laws 1907, § 206, subd. 15, giving a city jurisdiction over streams from which its water supply is taken to protect them from pollution.—Salt Lake City v. Young, Utah, 145 Pac. 1047.

109.——Riparian Rights.—Where a riparian owner has elected to take a definite quantity of water by appropriation, he waives his riparian rights.—Hedges v. Riddle, Ore., 146 Pac. 99.

110. **Wills**—Legacy.—A church society held entitled to a legacy to it to be used for paying the church debt, though the debt had been paid after the will was made.—Greeley v. First Universalist Society of Nashua, N. H., 92 Atl. 958.

111.——Probate.—Where the beneficiary under a will fraudulently informed the testator that she had destroyed it according to his directions, probate of the document which was not destroyed cannot be denied on the ground that it was revoked.—In re Silva's Estate, Cal., 145 Pac. 1015.

112.——Revocation.—A will making a complete disposition of testator's property and two codicils thereto, merely modifying its provisions, held not revoked by the revocation of a third codicil.—In re Diament's Estate, N. J., 92 Atl. 952.

113.——Subscribing Witness.—Where the testatrix did not acknowledge or declare to the other subscribing witness that the instrument was her will, the impeachment of one of the subscribing witnesses, who denied acknowledgment, does not warrant probate of the will.—In re Williams' Will, Mont., 145 Pac. 957.

114.——Testamentary Capacity.—Though a belief in any religious doctrine or philosophy can-

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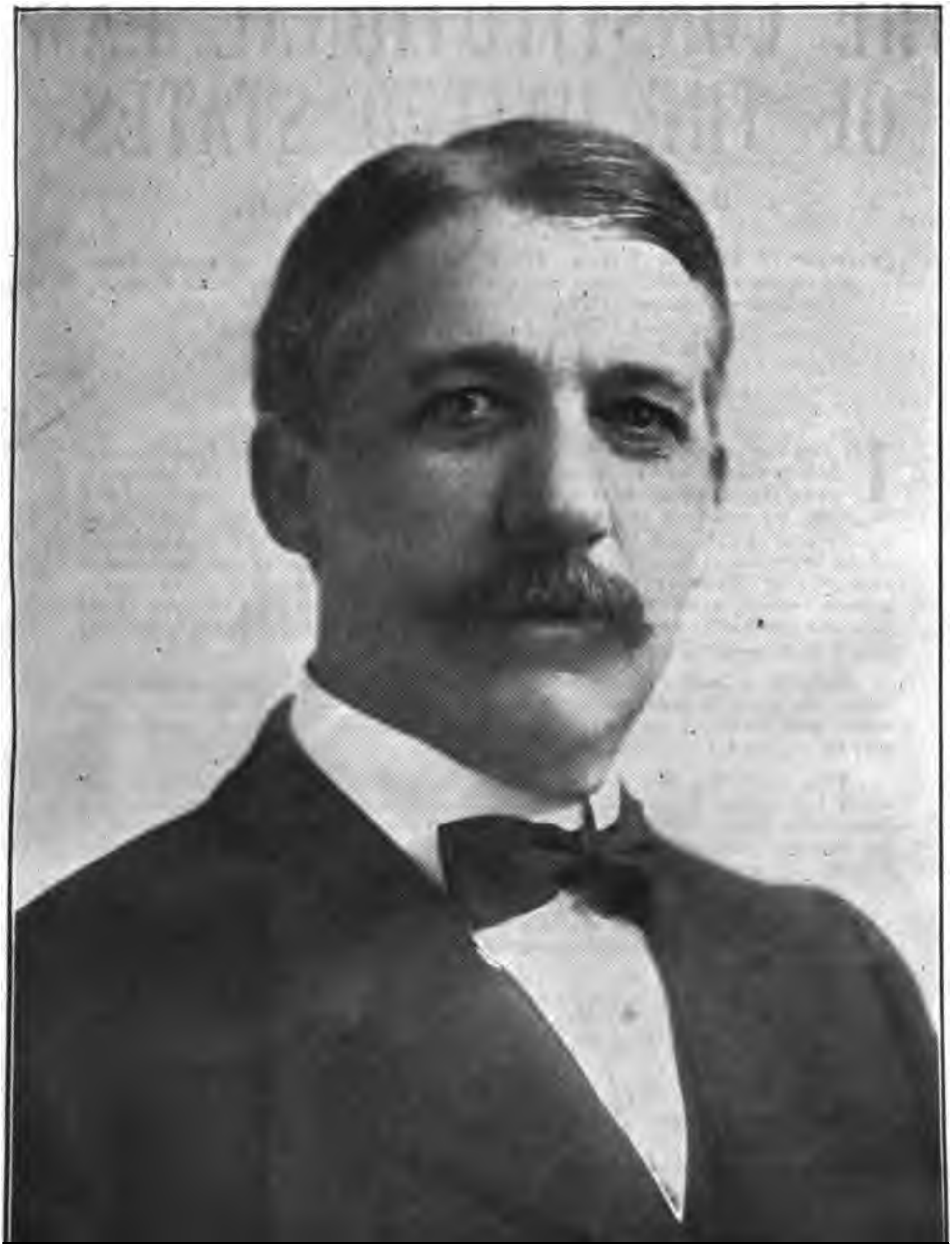

A Treatise upon the Complex System of Constitutional Jurisprudence by which this Country is Governed

THE CONSTITUTIONAL LAW OF THE UNITED STATES

By W. W. WILLOUGHBY, Ph. D.

Professor of Political Science, Johns Hopkins University; Managing-Editor American Political Science Review; Author of "The American Constitutional System," "The Supreme Court of the United States; Its Place and Influence in our Constitutional System," "The Nature of the State," "Rights and Duties of American Citizenship," etc.

IN these two volumes is set forth in philosophical form the Constitutional Jurisprudence of the United States as developed during the 120 years since the adoption of the Constitution. The author has not sought to duplicate the work of digests by collating various constitutional decisions of the Federal Courts, but by a careful and critical study of these decisions, and of the processes of legal reasoning underlying them, *has stated the fundamental principles of American public law in so clear, so complete and so systematic a form that the work will, it is confidently believed, be at once received as the standard authority upon the complex system of Constitutional Jurisprudence by which this country is governed.*

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PROF. WILLOUGHBY is the author of several authoritative treatises upon political and constitutional subjects, is the editor of the "American Political Science Review," and head of the department of Political Science at the Johns Hopkins University.

The work contains a full index and analytical table of contents and table of cases, giving references to the Supreme Court Reporter, the Lawyers' Co-op. Edition of the U. S. Reports, as well as the Official Reports of the U. S. Supreme Court.

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ST. LOUIS, MO., MAY 21, 1915.

LEGISLATION EX POST FACTO IN CHANGING THE PUNISHMENT FOR CRIME.

The United States Supreme Court considers the constitutionality of a statute of South Carolina changing the punishment of murder from hanging to electrocution, so far as regards such an offense committed prior to the statute is concerned, and upholds same as not being an *ex post facto* law. Maloy v. South Carolina, 35 Sup. Ct. 507.

Mr. Justice McReynolds, in speaking for the court, refers to Calder v. Bull, 3 Dall. 386, 390, as to the constitutional sense of *ex post facto* law, wherein it is said that: "Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed" is an *ex post facto* law.

The contention was made that: "Any statute enacted subsequent to the commission of a crime which undertakes to change the punishment therefor is *ex post facto* and unconstitutional unless it distinctly modifies the severity of the former penalty." If we substitute for the word "modifies," the word, mitigates or lessens, the contention would be more sharply expressed.

But in this inquiry we should remember, that the constitutional expression, "ex post facto law" is a limitation on state power, and it not being imposed the state would be free even to make more severe the punishment that has been affixed to the punishment of a prior crime. State constitutions generally contain the same prohibition on legislative power. The same observation is pertinent as to them. Its limitation must be taken according to the sense in which they are used.

Calder v. Bull, *supra,* was decided in the very early history of our country and similar provisions in state constitutions ought to be taken in the same sense in which it was construed, unless we may suppose that a right amply protected by the federal Constitution and from abundance of caution carried into state constitutions, was declared in a different sense in the latter. There is a well recognized rule that when a statute of one state is carried into the laws of another state, it goes there with prior construction. Why is not the same rule applicable to constitutional provisions?

Taking it, then, that we are seeking to ascertain whether a law is *ex post facto,* we must inquire, as a fact, whether, as in the case before the court, it "inflicts a greater punishment than the law annexed to the crime when committed."

We believe it was urged by Patrick that an unapplied-for commutation from execution to life imprisonment was a violation of his constitutional right, and it may be conceivable that one might prefer to be executed than doomed to suffer life imprisonment. But his claim was overruled, and rightly, too, we think, because the mere preference of a convict is no criterion by which to judge the constitutionality of a law. In well understood acceptance the death penalty is regarded as the supreme punishment of American law. Anarchists may well be thought less deterred by the death penalty for their acts than by solitary imprisonment for the remainder of their life. But the law would regard the latter punishment as a mitigation of the former.

And so if the means or method of inflicting death—a sudden snuffing out of the vital spark instead of slow strangulation to the end—is changed, some convicts might not supervene, though officially declared to have so done.

Refinement such as plaintiff in error invoked have not so great place in discussing the meaning of a limitation on power as it might have in considering the extent of a granted power, which in itself is a limitation on right.

This limitation on the right of a state is construed by our supreme court as it generally construes other similar restrictions in the federal Constitution, that is to say, the words of the Constitution are taken as controlling actual, practical considerations and not according to metaphysical claims hindering their application. By this kind of construction only may our dual system of government preserve to the general government and to the states their rightful control, whether in public functions or the regulation of private right. The contention of plaintiff in error was disallowed.

NOTES OF IMPORTANT DECISIONS

RESPONDEAT SUPERIOR—VERDICT IN FAVOR OF SERVANT AND AGAINST MASTER.—In 79 Cent. L. J. 4, there was an article by our editor under the title: Inconsistent Verdict in an Action Against a Master and His Servant, in which it was discussed: "Whether, where the liability of the master or a corporation is dependent upon the wrongful act of the servant or agent, a verdict against the latter is a necessary predicate, in form or effect, of a verdict against the former, both being sued."

Consideration of this question recurs in a case decided by Supreme Court of Iowa, where it was held that a corporation and its servants being sued in tort for an act committed by the latter and there being a verdict in their favor and against the corporation, no judgment could be entered against the corporation. Hobbs v. Illinois Cent. R. Co., 152 N. W. 40.

This case shows that it follows prior decision relying on Doremus v. Root, 23 Wash. 715, 63 Pac. 574, 520 L. R. A. 649, which case, however, relied on other cases where there volved, and, at all events, the inconsistency in a verdict does not prevent a master from suing a servant for recovery where he pays. Indeed, it would appear that not only is the part of such a verdict releasing the servant not binding on the master, but the record in such a case when read as it should be read ought to be conclusive for the master in his right to recover against the servant. This would come under the principle Falsa demonstratio non nocet. While the Iowa case cites much authority, it all harks back to Doremus v. Root, which, as we have seen, was not directly supported by authority. As authority to the contrary we cite, Ill. Cent. R. Co. v. Clarke, 85 Miss. 691, 38 So. 97; Verlinda v. Stone-Webster Eng. Co., 44 Mont. 251, 119 Pac. 573; Gulf, etc., Ry. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743; Schumpert v. Ry., 65 S. E. 322, 43 S. E. 813, 95 Am. St. Rep. 802; Carson v. Ry., 68 S. C. 55, 46 S. E. 525.

The trouble about the rule the Iowa court supports is that it penalizes a plaintiff for acting strictly within his rights, and, howsoever plain his case against all defendants might be, a jury by its illogical act may defeat his rights, notwithstanding that its act is in no wise conclusive against the master having recourse for any judgment it might pay in suing his servant. The jury do say that in finding against the master the servant is in fault, but it refuses to record a finding to this effect.

EVIDENCE—OPINIONS GIVEN BY NON-EXPERT WITNESSES.—In a case decided by Texas Court of Criminal Appeals, there was a claim by an accused that she shot deceased in self-defense. Latham v. State, 172 S. W. 797.

Accused testified that immediately before she shot, deceased shifted his knife from his right to his left hand, and dropped his right hand down to his belt as though to draw a pistol. A bystander testified to the same thing and that the acts and conduct of deceased produced the impression on his mind that he was attempting to draw a pistol. Testimony of this impression was held to be admissible.

In the opinion by the Texas court there is given such an apt description of the things an ordinary witness may testify about, and which in a sense at least are mere opinions, that we think it worthy of reproduction.

It was said: "The instantaneous conclusions of the mind as to the appearance, condition or mental or physical state of ing, matters of fact and are admissible in evidence. The matters referred to are those of which the mind acquires knowledge by the simultaneous action of several of the senses so that an impression is produced on the mind which cannot be traced to any one fact perceived by a single sense, but a statement of which is nevertheless a statement of a matter of fact. A witness may say that a man appeared intoxicated or angry or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase, 'matter of fact,' as used in the law of evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. * * * This character of evidence is treated in many cases as opinion, admitted under exception to the general rule, and in others as matter of fact—'shorthand statement of fact' as it is called. It seems more accurate to treat it as fact, as it embraces only those impressions which are practically instantaneous, and require no conscious act of judgment in their formation."

This statement gives a far more rational basis for the admission of such evidence than any we have seen. A sudden impression on the mind is like a blow on the body, and unless we admit such impressions as fact, little indeed of what we acquire by sense of sight, feeling, taste, touch or smell, really would be competent evidence.

CONSTITUTIONAL LAW — DISCRIMINATION AGAINST JEWS IN READING THE BIBLE IN PUBLIC SCHOOLS.—A very interesting review of the question of discrimination in the reading of the Bible in the public schools is that in Herold v. Parish Board of School Directors, 68 So. 116, decided by Louisiana Supreme Court.

In this case a Roman Catholic and a Jew complained that their religious rights were discriminated against in the reading of the Bible in the public schools. The court held that this was true so far as the Jew was concerned, but not true so far as the Roman Catholic was concerned, and the reading was prohibited.

The reasoning as to this distinction between the Catholic and the Jew proceeds on the the-

resolution of the board, and they deny that there was any "intention to resort to any sectarian practice" in the schools.

The court speaks of the various Catholic and other versions of the Bible, but conceding that the Catholic version comes within the resolution, it was objected by the Catholic plaintiff, that the Catholic child is taught that there should be no "reading of the Bible without authoritative comment from the head of his own church," and daily exercises in such reading "subjects him to a form of worship of which his parents do not approve."

To this the court says: "The Catholic child may or may not be prohibited from reading the Bible without such authoritative comment, but such prohibition would not be a doctrine of that church or creed. And in view of the very recent utterances of His Eminence, Cardinal Gibbons, one would not think that such prohibition can exist. That eminent man of God and high churchman, in a recent sermon, pointed to his own college days, when he says he carried a New Testament at all times and read one chapter every day." After making further observations along this line, it is said: "We cannot conclude that plaintiff, Marston, or his children would have their consciences violated by the reading of the Bible."

When it comes to the Jew, the court cites the Declaration of Independence, speaking of our "Creator," "the Supreme Judge of the world," and "our Lord," and oaths, concluding with "So help me God." It is said, in regard to reading the New and Old Testament, that: "with the Jew it is different. He denies that the New Testament is the word of God, and he denies our Savior. He does not deny most of the moral teachings of Jesus Christ, but he denies His divinity, and His resurrection." Therefore it is said a Bible, as containing the Old Testament and the New Testament is not his Bible and it is a denial of his religious rights that his child should be taught that it is.

It may be true that no court is called on to decide which of several versions of the Bible is correct, but, if teaching a Protestant child by reading the Catholic version seriously militates against belief in the religion of his parents, there is no occasion for a court to go into fine-spun reasoning about Constitutional rights. It is as if a court is so minded to

RECENT DECISIONS IN THE BRITISH COURTS.

With reference to the question whether, under the Workmen's Compensation Act, an accident arises out of and in course of a workman's employment, an interesting application has recently been made of the maxim so familiar in insurance law—*causa proxima non remota spectatur*. The principle was first noticed in connection with Compensation Law in Manson, 1913, S. C. 921. There a ship's carpenter working on the poop of a vessel lying in harbor was severely burned owing to some shavings by which he was surrounded being ignited by a match carelessly thrown down by a shore laborer. The carpenter's trousers happed to be saturated with inflammable oil which had leaked from a barrel he had shifted in the course of his work, and thus readily caught fire from the shavings. The court held that the man had been injured by an accident arising out of and in the course of his employment. Lord President Dunedin pointed out the fallacy of the employer's argument: "It was not the throwing down of the match that was the accident; the fire was the accident, but the throwing down of the match was the cause of the accident. It was through the accident namely the fire that the purser was injured. Well, I think that was a risk to which he was exposed to a greater extent than other people because of his employment. Other people were not exposed to the risks of that fire, because they had not to work on the poop among these shavings and to work in oily trousers."

Now in a recent case the rule thus indicated was formulated more precisely. An ironmonger's helper was working with a hammer beside boxes of molten metal. While doing so he was struck at random by a drunk man who had come into the work shop. The blow caused the helper to lose his balance and fall between the boxes of molten metal sustaining severe injuries. The court held that that was an accident arising out of and in course of the employment and awarded compensation. The judge who gave the leading opinion said: "One must distinguish between the *causa proxima* of the injuries and any antecedent cause of the accident. If the immediate cause of the injuries was an accident arising out of the employment, it is immaterial to investigate its prior cause or causes. Thus, in the present case, if the burns and bruises directly resulted from an accident then the accident arose out of the employment, and the court need not and ought not to enquire whether the fall itself was caused by something not arising out of and indeed quite unconnected with the employment, namely the unwarrantable blow of an intoxicated stranger."

It might be thought that the well known phrase "on approval" could not admit of much doubt at this time of day, but in Berry & Co., Ltd., v. Star Brush Co., Ltd., 1915, 1 K. B. 77, the question of construction was by no means easy. Berry & Co. had asked the Star Brush Co. to supply them "on approval" with a particular machine which was to be obtained by them from Germany. Their letter contained the following conditions: "If we reject the machine within twenty-one days, we are to pay the carriage both ways . . . with a sum not exceeding 50/— for cleaning up the machine. If we retain the machine we are to pay for it and for the carriage from Germany." These conditions were accepted and the machine was sent. Berry & Co. rejected the machine within twenty-one days, and stated as their reason that though the machine itself was quite satisfactory, they anticipated that its use would cause trouble with their workmen. The Star Brush Company maintained that as the machine had been sent "on approval" it could only be rejected on some ground having relation to the machine itself. The court held that this was not merely a contract to supply goods on approval. There were conditions as to paying freight, etc., which showed that there was a right to reject for other reasons than defects in the goods themselves.

The Court of Appeal have now given judgment in the "Titanic" litigations and it will interest readers if we concisely state exactly what they have found. The cases arose out of the loss of the Titanic on a voyage from Queenstown to New York when she collided with an iceberg and sank. The jury before whom the cases were tried found that this casualty was the result of negligence on the part of the defendants' servants. The defendants relied on a condition on the back of the "Steerage Passengers' Contract Tickets" exempting the defendants from the consequences of neglect of default of the ship owners servants. This condition had not been approved by the board of trade. By sub-section 2 of section 320 of the Merchant Shipping Act, 1894, such a contract ticket is required to "be in a form approved by the Board of Trade and published in the London Gazette

tion." The form approved by the Board of Trade contained a "direction" that "a contract ticket shall not contain on the face thereof any condition, stipulation or exception not contained in this form." It was held by Vaughan Williams and Kennedy, L. J. J. (Buckley, L. J., dissenting) affirming the decision of Bailhache, J., that the condition, exempting from the consequences of negligence of the defendant's servants, not having been approved by the Board of Trade, was invalid and therefore the defendants were not entitled to the benefit of any such exemption.

DONALD MACKAY.

Glasgow, Scotland.

REFORM IN PROCEDURE IN ILLINOIS.

The State of Illinois possibly adheres more strictly to the common law forms of procedure than any other state in the union. The Illinois Bar Association, like that of many other states, has for a number of years endeavored to bring about a reform in procedure. Recent meetings of the Bar Association have been devoted solely to the discussion of this subject. Bills have been introduced in legislature, fathered by the Bar Association, but have never met with favorable results.

A great many of the lawyers, particularly the older practitioners, are wedded to the common law system, and it was with no little difficulty that the Illinois Bar Association was persuaded to take the initiative in this reform movement. After the Association prepared and approved bills and had them introduced in the legislature, they were opposed by a number of lawyers and judges throughout the state who used different arguments in opposition to their passage. Some of them contended that the common law system of pleadings was the most logical and scientific that had ever been devised to bring to an issue matters ing for changes to be made so long as the common law method of pleadings was not disturbed. Others opposed them upon the grounds that the lawyers and judges had spent long years in familiarizing themselves with the common law system; the practice was well settled and understood, and by the adoption of a new method the lawyers would be compelled to begin anew on the procedure question and do their work over. They further contended that it would be a long time before the courts would have finally settled and definitely fixed the new method, whatever it might be, into a perfect system.

While the lawyers and judges have been somewhat divided upon the necessity of reform in this regard, the laity have been of uniform opinion that such reforms were necessary. They have been unable to see why a matter pending in a court could not be brought to an issue in that same business-like way that other business matters are transacted. Their experience as clients has taught them that a great deal of time is consumed in quibbling over immaterial matters. The fact that they have been unable to understand the manner in which issues are settled has calculated to bring about general dissatisfaction upon their part. This feeling of dissatisfaction has been confined largely to the better, or at least the most profitable, clientage of the lawyer. The successful business man feels that the delays in bringing questions pending in the courts to an issue and to trial are inexcusable.

There is no question but that the lawyers, in procedure and other matters connected with their profession, have not made the progress that has been made in the business world and in other professions; that there is room for improvement goes without saying. One of the reasons for lack of progress in the lawyer is that his work over-conservative; he tends to make [illegible] to see what has been done and said upon the subject. He looks for precedence and when venturing out on strange and new paths he goes slowly and with caution. The lawyers of Illinois have, nevertheless, made progress on this subject.

When the question was first considered by the Bar Association it had but few friends among the members. They were known as "reformers" and it was somewhat of a reflection to be classed among them. With the help of nearly all of the professors in the law schools they have steadily gained ground until now it is regarded as quite respectable to be considered a "reformer."

After this general sentiment for reform was brought about there arose the great question of how it was to be accomplished, and it was settled with no little difficulty. All agreed that amendments should be made that would eliminate useless technicalities and that liberal power should be given the supreme court to prescribe rules of procedure, but upon the question of practice a number of the lawyers wanted to retain the common law forms, use them as the frame-work, and bring about the reforms by way of amendments. Others realized that such a course would necessarily compel us to retain many of the technical questions that we were endeavoring to avoid and would not satisfy the people who are demanding that the lawyers devise some scheme that would simplify procedure and practice, bring about cheaper and more speedy litigation.

About this time we began to realize that the country from which we received the common law practice had abandoned it over forty years ago. It was thought that soon of the opinion that with slight changes, it could be made to fit our conditions. In the main it met the views for which a majority of our lawyers have been contending; that is, it contained only basic provisions with reference to procedure and practice and left the remainder to be supplied by rules of court. We therefore adopted it as the basis for the formation of bills to bring about the reforms desired and prepared and had introduced in both the House and Senate of the present General Assembly two bills—one with reference to law and the other with reference to equity procedure and practice. The law bill contained seventy-one sections and the equity bill fifty-one sections, including the repealing clauses. They, in the main, accomplish the following reforms:

They avoid unnecessary delays in this: they provide that the courts shall be always open; all processes are made returnable within twenty days, except in extraordinary cases, when the court may make them returnable sooner. The defendant is required to plead within twenty days, unless further time is obtained. The service of process is made easy and convenient.

Liberal provisions are made with reference to the joinder and misjoinder of parties and joinders of causes of action so that unnecessary delays will not be occasioned on this account, and a multiplicity of suits will be avoided.

All forms of action are abolished and the pleadings are a statement of claim by the plaintiff and a reply or answer by the defendant, with provisions for set-offs and counter-claims. New issues cannot be raised by the replication. It is intended the issue will be formed by the statement

They then provide that the supreme court shall make all necessary rules and prescribe forms to make these bills workable and carry into effect the reforms intended. They not only provide that the supreme court shall add to these measures, but that the provisions with reference to practice may be amended by the court.

We have not an opportunity here to call attention to all of the reforms that will be accomplished by these bills.

There is one reform that they do not accomplish. It is contemplated that the court will instruct the jury as to the law by a connected charge, but they do not positively provide that he shall do so. Our method of instruction is more calculated to confuse a jury than instruct them upon the law. It is folly to think that ordinary jurors, unskilled and untrained in the law, are capable of reconciling the apparent inconsistencies presented by our method of instructing juries. No doubt we will some day adopt a more rational and sane method, and juries will be instructed either orally or in writing by a connected charge.

These bills have been unanimously voted out by the committee to which they were referred, are now on second reading in the House, and have a fair prospect of passage, but what the final outcome will be it is impossible to foretell. We usually find about the same opposition in the legislature that we first encountered in the Bar Association. There is, however, one encouraging fact: we are constantly gaining recruits and we never lose any, so that if we fail now we will some day pass these or similar reform measures.

The following good reasons can be urged in favor of adopting the English Judicature Act:

1st. It accomplishes the reforms desired.

capable of handling them and is always open for action.

3d. The Act itself and the rules adopted under it have been construed by the English courts and we can have the benefit of such construction.

4th. It is quite desirable that there be uniform procedure and practice throughout the states of the union and the various states are more likely to unite upon this method than any other.

It is to be hoped that the American Bar Association, through its committee on Uniform State Laws, will take up the question of procedure and practice in the various states, and that it will be aided by the Bar Associations of the various states. Such a general movement will not only give us the reforms desired, but will furnish a uniformity in procedure and practice that will result in great good.

EDWARD C. KRAMER.

E. St. Louis, Ill.

COUNTIES—DEFECTIVE ROADS.

SNETHEN v. HARRISON COUNTY, et al.

Supreme Court of Iowa. April 8, 1915.

152 N. W. 12.

Acts 35th Gen. Assem. c. 122, authorizing and requiring counties to establish county roads, and requiring them to construct such roads and erect the necessary bridges and culverts, does not impose upon a county liability for injury caused by negligence in the performance of those duties.

DEEMER, C. J. Plaintiff claims that a defect existed in one of the highways of defendant county, over which its board of supervisors had assumed jurisdiction under the new road law, as a part of the county road system; that this defect consisted in the washing out of a fill in a ravine, which was crossed by the upon the new highway, and proceeded to grade the same by day labor, and to construct a temporary bridge over the ravine.

Plaintiff alleged that the defendants, and each of them, carelessly and negligently improved and constructed that portion of the said county road so that there was nothing on the surface of the ground between the said sharp curve and the banks of the said ditch to indicate to the traveler that he had left the road and was on the ground between the road and said ditch; that defendants negligently constructed the said road up to within 20 feet of the bank of said ditch, and then caused the same to turn sharply to the south and run along the bank of said ditch to the said temporary bridge, and, after crossing the said bridge, to run along the opposite bank of said ditch in a northerly direction, when a sharp curve was again made directly opposite the point where the aforementioned sharp curve was made; that the said defendants, and each of them, negligently and carelessly opened the said road for travel before the completion of a permanent bridge across the said ditch; that the said defendants, and each of them, negligently constructed the said bridge off of and to the south of the said road, at a point about ——— feet to the south thereof; that the said defendants, and each of them, negligently failed and refused to construct any obstruction at said curve to prevent travelers running off of said road and into said ditch; that they negligently failed and refused to construct any guard or signal to indicate to travelers along said road the position of the said ditch, the location of the said temporary bridge, or the dangerous condition of the said road; that the said defendants, and each of them, negligently failed to erect any guards along the banks of said ditch and between the road and the said ditch.

Plaintiff further alleges that long prior to the 16th day of August, 1913, the abovenamed individual defendants, and each of them, were orally warned, as aforesaid, that, unless some obstruction, guard, or signal was erected in said road at said point, there was a likelihood of travelers along the said road being precipitated into said ditch and being either injured or killed, but that, notwithstanding the said warning, the said defendants, and each of them, negligently failed and refused to provide any obstruction, guard, or signal whatsoever for the protection of travelers along said road as notice of the dangerous condition of the said road, as aforesaid, was given to any of the above-named defendants.

[1, 2] It is further alleged that plaintiff's intestate, who was in an automobile driven by one Clifford Townsend, was injured and afterward died as a result of the driver's running his machine into the said open ditch without any fault or negligence on his part. The demurrer challenges the liability of the county under this state of facts, and it is frankly conceded that, unless our new road law imposes liability upon the county either expressly or by fair implication, there can be no recovery. Counties, unlike cities and incorporated towns, are not, as a rule, held liable for torts committed by them, so long as they are acting within the scope of their governmental powers. They are quasi municipal corporations engaged in the performance of governmental functions, and are not responsible for the neglect of duties enjoined upon them, in the absence of statute giving a right of action. Kincaid v. Hardin County, 53 Iowa, 430, 5 N. W. 589, 36 Am. Rep. 236; Wilson v. Jefferson County, 13 Iowa, 181; Wilson v. Wapello County, 129 Iowa, 84, 105 N. W. 363, 6 Ann. Cas. 958; Green v. Harrison County, 61 Iowa, 311, 16 N. W. 136; Packard v. Voltz, 94 Iowa, 279, 62 N. W. 757, 58 Am. St. Rep. 396; Wenck v. Carroll County, 140 Iowa, 558, 118 N. W. 900; Wood v. Boone County, 153 Iowa, 92, 133 N. W. 377, 39 L. R. A. (N. S.) 168, Ann. Cas. 1913D, 1070; Soper v. Henry County, 26 Iowa, 264.

In the last-cited case, Judge Dillon, speaking for the court, said:

"Counties are involuntary political or civil divisions of the state, created by general statutes, to aid in the administration of government. They are essentially public in their character and purposes. They are simply governmental auxiliaries, created bodies corporate for 'civil political purposes only.' Rev. § 221. To the statute they owe their creation, and the statute confers upon them all the powers * * * they possess, prescribes all the duties * * * they owe, and imposes all the liabilities to which they are subject. To enable them better to exercise their powers and discharge their duties, our statute clothes them with corporate capacity. Considered with respect to their powers, duties, and liabilities, they stand low down in the scale or grade of corporate existence. It is for this reason that they are ranked among what have been styled general or special charters, more amply endowed with corporate life and functions, conferred in general at the request of the inhabitants of the municipality for their peculiar and special advantage and convenience. The decisions of the courts in every state of the Union, recognizing this distinction, hold incorporated cities and towns to a much more extended liability than they do counties, school and road districts, even where the latter are declared to be invested with corporate capacity. Thus, incorporated cities and towns, wherever they are invested by their organic or constituent acts with general supervision and control over their streets, with power to grade and to improve them, and with the power to levy taxes or raise revenue, which may be used for the purposes of such repair, are held liable, without any statute expressly giving the action, for injuries caused by unsafe and defective streets. * * * (Citing authority.) On the other hand, the decisions are almost (though not wholly) uniform to the effect that counties and other quasi corporations are not liable to private actions for the neglect of their officers in respect to highways, unless the statute has in so many words created the liability, specially giving the action to the party injured. (Citing authority.) * * * The opinion of the court is that the court below rightly held that the county was not liable to the plaintiff in respect of the injury for which his action was brought. If the county ought to be liable in such a case, the remedy must be sought from the Legislature."

It is needless to quote from the other cases, although it may be said that Packard v. Voltz, supra, is so nearly like this one in its facts, that the principle announced must govern here.

The new road law (chapter 122 of the Acts of the 35th G. A.) authorizes and requires counties to establish county roads, and requires them to construct these roads and to erect the necessary bridges and culverts according to approved plans.

The defendant county was in the exercise of its powers upon the road in question, and it must be assumed that its board or employes, or both, were extremely negligent in leaving the dangerous place in the road. But they had not constructed a bridge at the point of the accident, so plaintiff's intestate was the statute anywhere which indicates any intention on the part of the legislature to impose any liability upon the county for negligence on its part in the doing of its work.

Appellant contends, however, that the county should be held liable on the same theory that it is responsible for the construction, maintenance, and repair of county bridges; and it must be confessed that the analogy is quite close. But this court, in adopting the rule of liability for defective bridges, did not follow the general rule then existing in other jurisdictions, and has since its adoption persistently and consistently refused to enlarge the same. See cases hitherto cited. It has refused to apply it to county jails and courthouses, to ditches and drains constructed by legislative authority, and to the care of paupers and insane; and it may well be affirmed that county bridges constitute the only exception in this state to the rule of nonliability.

[3] II. It is insisted, however, that the individual members of the board of supervisors, who were actively engaged in the work, are liable personally. As they were engaged in a public work in virtue of their office, the rule of nonliability applies to them, as well as to the body for which they were acting. Packard v. Voltz, 94 Iowa, 279, 62 N. W. 757, 58 Am. St. Rep. 396; Wood v. Boone County, 153 Iowa, 92, 133 N. W. 377, 39 L. R. A. (N. S.) 168, Ann. Cas. 1913D, 1070. Upon this proposition, there is a lack of uniformity in the decisions of the various courts of this country; but, after a careful examination of the underlying principles which should govern, this court has held that the agents who perform the governmental functions are no more responsible than the artificial body—the corporation for which they acted. We see no reason for departing from any of these established rules.

The trial court was right in sustaining the demurrer, and its judgment is affirmed.

EVANS, PRESTON, and SALINGER, JJ., concur.

NOTE.—*Individual Liability of Contractors for Negligent Construction of Highway.*—The instant case admits there is some conflict of authority upon the question whether there is individual liability of those who act for a county, constructing a highway, though the county itself be not liable. Thus it has been held that where one contracts with a county to keep its roads in because the bond was for the exclusive benefit of the county, not in itself liable to such individual. But it is said the court has never decided that the contractor might not be personally liable in tort. In the Wade case this personal liability was declared, and after generally declaring such liability, it was further pointed out that there was a criminal liability attached to the contractor's default, but this is not specially stressed as the ground of personal liability. It was said: "He also owed to the public a general duty to keep the roads in general repair."

In Solberg v. Schlosser, 20 N. D. 307, 127 N. W. 91, 30 L. R. A. (N. S.) 1111, it was held that one contracting with a drainage board in such a way that a drain to be constructed would not render a highway dangerous is liable for defects injuring a traveler on the highway. It was said in this case that defendant was an independent contractor and there being no relation of principal and agent, defendant was liable in tort for his acts. It was defendant's duty to restore the highway where his acts made it dangerous, Evansville & T. H. R. Co. v. Crist, 116 Ind. 446, 19 N. E. 310, 2 L. R. A. 450, 9 Am. St. Rep. 865, being cited in support of this principle. But this does not seem to hold that the contractor was liable except for his putting obstructions on a highway in the course of doing other work.

The instant case speaks of there being some conflict as to this question, but we have been able to find only the two cases above decided, and they do not appear to be really opposed.

As to liability of a county, only in Maryland have we found any cases holding to liability, and they plant themselves upon the peculiarity of statutes. Anne Arundel County v. Carr, 111 Md. 141; Richardson v. Commrs., etc., 120 Md. 153, 87 Atl. 747.

In Oklahoma it is said the rule as to counties governs as to townships. June v. Wellston Tp., 18 Okl. 56, 90 Pac. 100, 13 L. R. A. (N. S.) 1219, 11 Ann. Cas. 938.

We think it may be said that virtually there is no conflict of view to the several propositions the instant case declares, unless a statute specifically imposes liability. C.

JETSAM AND FLOTSAM.

FROM THE OUTSIDE OF THE REPORTS.

(By Gladys Judd Day, Librarian, Hartford Bar Library, Hartford, Conn.)

What's in a name?
  Bumgardner v. Scaggs, 180 Ill App. 668.
Poor Fido!
  Boots v. Canine, 94 Ind. 408.
A case for St. Peter.
  Angel v. Methodist Protestant Church, 62 N. Y. Sup. 410.
Something doing!
  Knock v. Boost, 145 Ill. App. 411.
  Gladfelt v. Bonnet, 24 Ill. App. 533.
A case for the neutrality commission.
  Battle v. Shute, 37 Head. 547 (Tenn.).
Dishabille!
  Panton v. Collar, 12 Ill. App. 160.
Assigned for Friday.
  Cook v. Mackrell, 70 Pa. St. 12.
A sharp contest.
  Razor v. Razor, 42 Ill. App. 504.
Why not kiss and make up?
  Dikis v. Likis, 65 So. 398 (Ala.).
Money talks.
  Cash v. Cash, 180 Ill. App. 31.
Cracked!
  Nut v. Knutt, 200 U. S. 12.
In bad!
  Boggs v. Sinking Fund Commissioners, 10 N. J. L. J. 219.
This case should be waived.
  Beach v. Wade, 3 Wkly. Notes Cas. 219.
A case for the sexton.
  Bone v. Graves, 43 Ga. 312.
Some blow!
  Breeze v. Sails, 23 N. C. R. 94.

ITEMS OF PROFESSIONAL INTEREST.

THE STORY OF THE ILLINOIS STATE BAR ASSOCIATION.

The Illinois State Bar Association was organized January 4, 1877, at Springfield, Illinois, where a number of representative lawyers of Illinois from different parts of the state met during the session of the general assembly, and believing that the lawyers of the state ought to be organized in order to accomplish some things that seemed necessary for the general welfare.

The object of the association, as stated in its constitution, is "To cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to elevate the standard of integrity, honor and courtesy in the legal profession, to encourage a thorough and liberal legal education and to cultivate and cherish a spirit of brotherhood among the members thereof." The object of the association is not selfish in any pecuniary sense. It is in the largest sense for the public welfare.

The association holds two day meetings annually and alternates these meetings between

The association has grown in numbers until it now has a membership of about 2,000 and is the second largest state bar association in the United States. Its membership is composed of the leading lawyers of the state and every city in the state has representatives on its roll of members.

The association has been active for more than thirty-eight years in the discussion of questions that are of interest to the profession as well as of public interest. Justice is properly regarded, as Webster once said, as "the greatest interest of man on earth," and it is in the promotion of justice that the association is concerned. It has been active in preparing and recommending legislation which looks to the advancement of justice, the simplification of the processes of the law and to make justice both certain and speedy. It was active in securing the enactment of amendments to the practice act, which have cut away many of the technicalities of the law and its officers and proper committees are now engaged in endeavoring to secure still greater simplification of procedure in the trial of cases, both in law and equity.

Many notable men have been guests of the association from year to year, who have spoken upon questions of particular interest to the profession. Its work is largely done through committees that are appointed from year to year that deal with such subjects as Law Reform, Judicial Administration, Legal Education, Uniform State Laws, Grievances Against Lawyers, Admissions to the Bar, Professional Ethics, and similar subjects, and special committees are appointed to investigate and report on special subjects that peculiarly require the attention of lawyers.

County bar associations in various counties of the state are affiliated with the state association, and in addition the state of Illinois is divided into seven supreme court judicial districts, each of which maintains a district association which is affiliated with the state organization. In this way the needs of the various counties in the districts are brought to the attention of the state association and the recommendations of the state association find a convenient means of reaching the lawyers throughout the state.

The president of the association for this year is Hon. Edward C. Kramer, of East St.

For the last past seventeen years has practiced law at East St. Louis, St. Clair County, Illinois, during all of which time he has been actively engaged in the general practice of the law. Is now the senior member of the firm of Kramer, Kramer & Campbell at East St. Louis, which firm represents a number of corporations.

He is a member of the American Bar Association. He has taken an active part in the proceedings of the Illinois Bar Association, particularly in the reform of procedure and practice, and a short article on that subject over his own signature appears in this issue of the Central Law Journal.

The next annual meeting of the association will occur at Quincy, Illinois, on Friday and Saturday, June 11th and 12th, 1915. The general subject for discussion at the meeting will be "Constitutional Revision." Delegates from county bar associations all over the state will be in attendance and speak for their associations, thereby bringing together the views of the leading lawyers of Illinois from Galena to Cairo on this important subjest.

Hon. E. C. Kramer will deliver the annual address. His subject will be concerning a new constitution for Illinois. Honorable Lawrence Y. Sherman and James Hamilton Lewis have accepted invitations to attend the meeting and take part in the program.

It has been many years since the lawyers of Illinois met in the western part of the state, and Mr. John F. Voigt, secretary of the association, announces that the Adams County Bar Association is making elaborate arrangements for the entertainment of the visitors. A boat ride on the Mississippi River and an automobile ride along the beautiful bluffs of the river are to be some of the methods of entertainment. The meeting will close with a banquet on Saturday night, at which prominent lawyers of the state will speak.

A. H. ROBBINS.

JOINT MEETING OF THE WASHINGTON AND OREGON BAR ASSOCIATIONS.

A joint convention of the Washington and Oregon Bar Associations will be held in Portland, Oregon, August 23, 24 and 25, 1915. Addresses will be made by Judge William Howard nadian bench and bar to attend. Hotel accommodations will be arranged upon request to Mr. A. B. Ridgway, secretary of the Oregon Bar Association, Northwestern Bank Building, Portland, Oregon. The program includes an auto trip along the new Columbia Highway.

MEETING OF THE OHIO STATE BAR ASSOCIATION.

The Executive Committee of the Ohio State Bar Association has fixed July 6th, 7th, and 8th, as the dates, and Cedar Point as the place for the holding of the thirty-sixth annual meeting of the association.

Addresses will be delivered by Honorable J. B. Foraker, of Cincinnati, Professor Roscoe Pound, of Harvard Law School, and Judge C. W. Dustin, of Dayton.

CORRESPONDENCE

RECENT REFORMS IN FEDERAL PROCEDURE.

To the Editor, Central Law Journal:

Your readers will be glad to know that two of the law reform bills which were recommended by the American Bar Association, have passed both Houses of Congress and become law.

The first gives the Supreme Court power to grant a writ of certiorari to review a judgment rendered by the highest court of a state that a statute of the state is repugnant to the Constitution, treaties, or laws of the United States. Until the passage of this act such a decision could only be reviewed in the Supreme Court when it was in favor of the validity of the state statute or authority. Had this new law been in force at the time of the decision of the New York Court of Appeals in the Ives case, (201 N. Y. 271), that the Wainwright Compensation Act was in violation of the Constitution, that case could have been carried directly to Washington and we should have been spared the somewhat absurd condition growing out of the conflict in the decision between the Court of Appeals of New York and the Supreme Courts of New Jersey and Massachusetts.

not brought on the right side of the court is absolute. All testimony taken before such amendment, if preserved, stands as testimony in the cause. It is also provided that in actions at law in the Federal courts equitable defenses may be interposed without the necessity of filing a bill on the equity side of the court. Equitable relief respecting the subject-matter of the suit may thus be obtained by answer or plea. The court is to regulate the review of the judgment and the "Appellate Court shall have full power to render such judgment upon the record as law and justice shall require." The Act also provides that defective allegations of jurisdiction may be supplied and amended at any stage of the cause. So that hereafter there will be no reversals on the ground of defective allegations of jurisdiction.

The Bar Association has been pressing these bills for several years. They have had the cordial support of many members of Congress.

EVERETT P. WHEELER,

New York.

Chairman Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation—American Bar Association.

BOOK REVIEW

BECK'S THE EVIDENCE IN THE CASE.

Mr. James M. Beck, late U. S. Assistant Attorney-General, has produced a revised edition of The Evidence in the case, being a Discussion of the Moral Responsibility for the War of 1914, as Disclosed by the Diplomatic Records of England, Germany, Russia, France and Belgium, the book being dedicated to Albert of Belgium, "Every Inch a King."

To this book there is an introduction by the Hon. Joseph H. Choate, former American Ambassador to Great Britain. This introduction may be thought to indorse quite fully the view or views taken in the book, in which the conviction that the moral responsibility for the war rests on Germany is expressed.

Mr. Beck is one of the noted lawyers of this country, but it is to be gravely doubted whether he is not going very much counter to the but the policy which he calls that of "blood and iron," alleged to prevail among "a group of distinguished German soldiers, professors, statesmen and even doctors of divinity, pretending to speak in behalf of the German nation." He thinks that some of them are "like Machiavelli, detestable but, unlike Machiavelli ridiculous." He calls this ruling class "Junkers," and thinks the German people no more responsible for what they say, than England for the three tailors of Tooley street, but to this "ruling caste the German people have committed their destiny," and he admits that the latter are supporting the former in a wonderful way.

Mr. Beck's principal contention is that Germany is responsible for the Austrian ultimatum to Servia; that she knew what it would be before it was sent, and the failure of the German White Paper to include the communications passing between Berlin and Vienna amounts to a suppression of evidence.

This is a serious charge and Mr. Beck endeavors to fortify his conclusion from the official documents of the countries, and especially by the silence of Italy and the late appearance of the Austrian Red Book failing to show a single document sent to or from Germany from July 6th to July 21st, when, Mr. Beck asserts, "the great coup was secretly planned by Berlin and Vienna."

Mr. Beck is both a literary and a forceful writer, but as Mr. Choate says, in his introduction, "he proceeds con amore to demonstrate the truth of his conviction by the most earnest and forceful presentation of the case." The book is well worth reading, but it should be regarded not as an impartial presentation of the case. He thinks Germany, or the "caste" speaking for it, capable of any misrepresentation and deceit, and what he says should be taken with a grain of allowance.

The book is in octavo form, of good type and paper, of over 250 pages, and is published by G. P. Putnam's Sons, New York and London, 1915.

BOOKS RECEIVED

The Evidence in the Case. A Discussion of the Moral Responsibility for the War of 1914, as Disclosed by the Diplomatic Records of England, Germany, Russia, France and Bel-

HUMOR OF THE LAW.

"Can I interest you in an attachment for your typewriter?" asked the agent, as he entered the office.

"No chance," replied Mr. Grouch. "I am still paying alimony on the strength of the attachment I had for my last typewriter."—Cincinnati Enquirer.

The following characterization by Justice Holmes, of the United States Supreme Court, of the technical construction of indictments in favor of the accused is worth preservation. He speaks of it as "the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert." Paraiso v. United States, 28 Supreme Court Reporter, 127.—The Docket.

The story goes that Mr. Taft, in his younger days when he was a law reporter, had been studying a case in Somerville, Ohio, and found he couldn't get back to the office that night unless he managed to stop a through express. So he wired to headquarters, "Will you stop the through express at Somerville to take on large party?"

The answer came back, "Yes."

The express was duly stopped at Somerville. The young law reporter got aboard with his copy, and the conductor said:

"Where's that large party I was to take on?"

"I'm him," was the grinning answer. "That's all."—Law Student's Helper.

Some time ago, according to S. L. Richey, in "The Docket," "a suit was filed in the district court here by four heirs against four other heirs for their interest in the estate of their father. I was employed to represent the defense.

"During the pendency of the suit one of the attorneys for the plaintiffs informed me of the death of one of his clients, and asked me if I had any objection to the case being continued until he could wind up the decedent's succession and make his heirs parties to the suit. I told him that I had no objection, and he arose, in open court, and began as follows:

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

Alabama	1, 9, 12, 23, 24, 31, 41, 48, 57, 58, 59, 61, 68, 72, 90, 93, 94, 98, 101, 108, 111, 119.
Arkansas	95, 99
Florida	50, 79, 109
Illinois	17, 25, 27, 29, 35, 44, 45, 47, 62, 78, 80, 81, 83, 89, 96, 100, 103, 107, 114, 118, 121.
Indiana	6, 10, 51, 82, 102, 112, 117
Iowa	3, 8, 14, 43, 74, 75, 85, 106, 113, 120, 124
Kentucky	2, 16, 116
Louisiana	21, 28, 37, 38, 42, 55, 84, 122
Massachusetts	11, 15, 20, 33, 52, 54, 67, 71, 87
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Minnesota	32, 76, 97, 104
Mississippi	30, 70, 91
Missouri	7, 18, 19, 22, 39, 40, 46, 49, 60, 65, 66, 73, 88, 105, 110.
New York	26, 77, 115, 123
Ohio	83
South Dakota	86
Texas	4, 13, 34, 36, 63, 64, 69, 92
Wisconsin	5

1. **Acknowledgment**—Validity of Instrument.—Where an instrument is valid without an acknowledgment, it will stand, notwithstanding the absence of jurisdiction in the officer taking the acknowledgment or fraud or duress in connection with it.—Butler v. Hill, Ala., 67 So. 260.

2. **Adverse Possession**—Permissive Possession.—Where a railroad was constructed on land belonging to those who controlled and directed it, the possession of the railroad was not adverse, and could not ripen into title.—Illinois Cent. R. Co. v. Taylor, Ky., 175 S. W. 26.

3.——Statute of Limitations.—The doctrine of adverse possession does not apply to municipalities or other bodies exercising governmental functions, and limitations will not run against their rights in a public alley.—Schultz v. Stringer, Iowa, 150 N. W. 1063.

4. **Alteration of Instruments**—Release.—An alteration of a stock subscription contract with respect to the number of shares and amount of capital stock subscribed for, releases the subscribers.—Bohn v. Burton-Lingo Co., Tex., 175 S. W. 173.

5. **Attorney and Client**—Contempt.—Language in the appellants' brief implying that the court seeks new plausible ways for the destruction of rights, etc., held highly reprehensible, and to be visited by denial of costs both for printing the brief and for attorney's fees; the briefs being stricken from the files.—Casper v. Kalt-Zimmers Mfg. Co., Wis., 150 N. W. 1101.

6.——Disbarment.—Any inherent power of the appellate court as to disbarring and reinstating any attorney is as to practice in such court, and does not include original jurisdiction to restore to right of practice in another court an

against the judgment creditor growing out of contract.—Kansas City Rapid Motor & Transp. Co. v. Young, Mo., 175 S. W. 95.

8. **Bailment**—Estoppel.—A party agreeing to hold without storage charges pianos of the adverse party, and to account for such as were sold by him, held not estopped from denying liability for loss of pianos by fire.—Waltham Piano Co. v. Lindholm Furniture Co., Iowa, 150 N. W. 1040.

9.——Notice to Remove.—Where the buyer agreed that the seller could store the ties in a boom for an indefinite time, the seller was entitled to a reasonable time to remove its ties, after notice of termination of the contract, before it could be charged for storage.—American Tie & Timber Co. v. Naylor Lumber Co., Ala., 67 So. 246.

10. **Bankruptcy**—Notice.— In an action against a physician for malpractice, an averment in defendant's answer of actual notice to plaintiff of the pendency of bankruptcy proceedings against defendant and discharge thereunder, held under Bankruptcy Act, § 17, to aver notice sufficiently to withstand a demurrer.—Reinhardt v. Freiderich, Ind., 108 N. E. 285.

11.——Preference.—A preference by a firm to a firm creditor cannot be recovered by the trustee in bankruptcy of the continuing partner, the right to recover being a right of the creditors of the firm, and not a right of the firm to which the continuing partner succeeds.—Rubenstein v. Lottow, Mass., 107 N. E. 718.

12.——Surety.—The remedy of the surety on supersedeas bond of appellants becoming bankrupt after judgment must be sought in the bankruptcy court.—Vandiver v. American Can Co., Ala., 67 So. 299.

13. **Banks and Banking**—Imputable Notice.—Knowledge of the president of a bank that a note given by defendant was a mere accommodation note for the president's own debt due the bank is not imputable to the bank so as to operate as a defense.—Hawkins v. First Nat. Bank of Canyon, Texas, Tex., 175 S. W. 163.

14.——Recovery of Payment.—A bank on which a check is drawn, having paid it, cannot recover the payment, in the absence of fraud, because the drawer did not have sufficient funds on deposit.—Bellevue Bank of Allen Kimberly & Co. v. Security Nat. Bank of Sioux City, Iowa, 150 N. W. 1076.

15. **Bills and Notes**—Accommodation Indorser.—Between an accommodation indorser and a person accommodated there is no liability, whatever their apparent relation on the paper, although as to third parties the rights and liabilities of the indorser are those of a party receiving consideration.—Conners Bros. Co. v. Sullivan, Mass., 108 N. E. 503.

16.——Accommodation Maker.—Under Negotiable Instruments Act, §§ 119, 120, an accommodation maker is not released by an extension of time for payment granted without his knowledge to the principal maker.—First State Bank of Nortonville v. Williams, Ky., 175 S. W. 10.

18.——Notice.—Under Negotiable Instruments Act, an indorsee of a note who took it with knowledge of the payee's agreement to renew it at maturity is bound by that agreement.—Farmers' & Traders' Bank v. Laird, Mo., 175 S. W. 116.

19. **Brokers**—Compensation.— One employed by another to find a third party who will make a certain loan to him, who finds such party able, willing, and ready to make the loan, may recover the compensation agreed upon.—Bartlett v. Garrett, Mo., 175 S. W. 79.

20. **Carriers of Goods**—Demurrage.—A carrier is not entitled to payment of freight or demurrage for a shipment consigned to a private track until it is delivered on that track.—New York, N. H. & H. R. R. Co. v. Porter, Mass., 108 N. E. 499.

21. **Carriers of Live Stock**—Delay.—Where the evidence showed that the delivering carrier was only slightly responsible for the delay, and not at all for the want of proper attention to the shipment, in consequence of which the animals were delivered in bad condition, it was not liable.—Duvall v. Louisana Western R. Co., La., 67 So. 354.

22. **Carriers of Passengers**—Burden of Proof.—In an action for the death of a street car passenger from injuries due to a violent stop of the car, plaintiff must prove the stop and that it directly resulted in the injury, but need not prove what negligent act produced the stop.—Allen v. Dunham, Mo., 175 S. W. 135.

23.——Contributory Negligence.—It is not contributory negligence, as a matter of law, for a passenger on a crowded street car to ride on the steps.—Mobile Light & R. Co. v. Hughes, Ala., 67 So. 278.

24.——Degree of Care.—When a street car company permits passengers to ride on the steps and platform of its vehicles, it must exercise care proportionate to the risk occasioned by the overcrowding.—Mobile Light & R. Co. v. Hughes, Ala., 67 So. 278.

25. **Charities**—Residuary Bequest.—A residuary bequest to a designated anti-saloon league, held not sustainable as a gift to charity, since the object of the gift was uncertain, and there was no trustee appointed, with power to render the object certain.—Volunteers of America v. Pierce, Ill., 108 N. E. 318.

26. **Constitutional Law** — Administrative Board.—The legislature may confer upon an administrative board or official the duty to determine whether conditions exist upon which an exemption from Laws 1913, c. 740, §8a, giving laborers in factories and mercantile establishments one day of rest in seven, is based.—People v. Klinck Packing Co., N. Y., 108 N. E. 278.

27.——Due Process of Law.—Local Improvement Act, §§ 57, 58, as amended by Laws 1913, p. 166, authorizing local improvement boards to make a new assessment and levy after the completion of an improvement, the assessment for which has been declared invalid, held as to owners liable to assessments, not a taking of property without "due process of law."—City of Lincoln v. Harts, Ill., 107 N. E. 725.

28.——Interest in Suit.—A citizen of Missouri, who has never been domiciled in Louisiana, has no interest entitling him to question the constitutionality of Act No. 156 of 1912, permitting pauper citizens of Louisiana to sue without previously paying or securing costs.—White v. Walker, La., 67 So. 332.

29.——Police Power.—The state may delegate the police power to local municipalities as it may deem for the best interests of the public, and may resume such power again when deemed expedient.—Sanitary Dist. of Chicago v. Chicago & A. R. Co., Ill., 108 N. E. 312.

[31. …] fendant, made to induce him to make the same, held no defense in the absence of an averment that they were intended as warranties or made with intent to deceive and defraud.—Mertins v. Hubbell Pub. Co., Ala., 67 So. 275.

32. **Corporations**—Action.—Where a contract to repurchase certain corporate stock assigned to plaintiff as collateral authorized him to sue to enforce such repurchase agreement, plaintiff could continue the suit after payment of its principal debt, under Gen. St. 1913, § 7674.—First National Bank of Hastings v. Corporation Securities Co., Minn., 150 N. W. 1084.

33.——Promoter.—Promoter of Massachusetts corporation, who controlled it and appropriated an increase of its shares without consideration, held to have committed a fraud on it and its stockholders, so as to entitle them to relief.—Keith v. Radway, Mass., 108 N. E. 498.

34.——Subscription.—A person induced by fraud to become a subscriber to corporate stock is relieved from liability to corporate creditors, where he repudiates his subscription promptly and before the rights of the creditors have intervened.—Bohn v. Burton-Lingo Co., Tex., 175 S. W. 173.

35. **Counties**—Inheritance Tax.—Where a county treasurer sought to retain, out of inheritance taxes collected, commissions not authorized by law, a taxpayer who had paid no part of such taxes may sue to restrain the treasurer.—Jones v. O'Connell, Ill., 107 N. E. 731.

36. **Criminal Evidence**—Prejudice.—Where accused did not put in issue his reputation for peace and quiet, argument by the state that, had he done so, it could have been shown that it was bad, was prejudicial.—Marshall v. State, Tex., 175 S. W. 154.

37. **Criminal Law**—Evidence.—The coat and gun worn by deceased at the time of the killing, having been introduced in evidence, should not have been permitted to be taken to the jury room during deliberation.—State v. Wooten, La., 67 So. 366.

38. **Damages**—Abandonment.—Where a contractor fails to prosecute the work as required and abandons it, he is liable for the additional cost of completing the contract.—Board of Com'rs of Plaquemines Parish, East Bank Levee Dist., v. Dowdle & Windett, La., 67 So. 324.

39.——Liquidated.—Liquidated damages are recoverable only where the party has suffered more than nominal damages.—Jackson County Light, Heat & Power Co. v. City of Independence, Mo., 175 S. W. 86.

40. **Death**—Action.—In an action against street railway for death of plaintiff's husband, the fact that such person had retired from active business held not to preclude plaintiff from recovering damages for loss of earning capacity.—Loomis v. Metropolitan St. Ry. Co., Mo., 175 S. W. 143.

41. **Deeds**—Estate Tail.—A deed to a man and his children, he being childless at the time the devise or conveyance takes effect, passes an estate tail, converted by statute into an unqualified fee.—Dallas Compress Co. v. Smith, Ala., 67 So. 289.

42. **Divorce**—Practice.—A wife who has obtained a final judgment of separation, assigning her custody of a child, cannot thereafter proceed by rule in the separation suit for alimony for the child; her remedy being by separate action.—Hardy v. Collins, La., 67 So. 333.

43.——Resulting Trust.—A husband, against whom his wife has obtained a divorce which made no disposition of the property, cannot complain of the disposition by the wife of property in which she had a resulting trust, and which was conveyed to her after the divorce.—Cooper v. Olson, Iowa, 150 N. W. 1028.

44. **Dower**—Right.—Where a wife is [illegible] mortgages on her [illegible]

same as other taxes necessary for state, county, and municipal purposes, as such provision is found in Farm Drainage Act, § 70, and relates only to the items named therein.—People v. Garner, Ill., 108 N. E. 344.

46. **Election of Remedies**—Estoppel.—Where, in suit between H. and B., after H. purchased land under agreement to do so in trust for the two and others, B. claimed title adverse to the trust agreement and title purchased, this was a final and irrevocable election, barring his subsequent claiming in the title purchased.—Brown v. Howard, Mo., 175 S. W. 52.

47. **Eminent Domain**—Common Law Duty.—Railroad company held under no common-law duty at its own expense to build a bridge over a sanitary district channel constructed across its right of way after the building of its railroad.—Sanitary Dist. of Chicago v. Chicago & A. R. Co., Ill., 108 N. E. 312.

48. **Estoppel** — Chattel Mortgage. — Under "blanket" chattel mortgage by husband and wife, wife held not to have conveyed husband's property or warranted his title, and not precluded from purchasing his property from a prior mortgagee or from claiming title thereto.—King v. Thomas, Ala., 67 So. 241.

49.——Forfeiture.—A mining lessor, having appealed from a judgment denying forfeiture, cannot, during the pendency of the appeal, insist in another suit the lessee comply with the lease which required installation of costly machinery and continuous mining.—Weaver Mining Co. v. Guthrie, Mo., 175 S. W. 118.

50. **Execution**—Trover.—An owner of property wrongfully seized under execution levied under the express directions of plaintiff in execution may maintain trover against such plaintiff.—Toomer v. Fourth Nat. Bank of Jacksonville, Fla., 67 So. 225.

51. **Executors and Administrators**—Will Contest.—The judgment of the circuit court in a will contest, denying validity to the will, does not end the contest or set aside the appointments, since the executor may appeal, although his powers to administer the estate are suspended during the pendency of such appeal.—Dinwiddie v. Shipman, Ind., 108 N. E. 228.

52. **Explosives**—Gas Pipes.—Blasting in laying gas pipes resulting in water percolating from pond into abutting owner's cellar held to give him no right of action at common law in the absence of negligence.—MacGinnis v. Marlborough & Hudson Gas Co., Mass., 108 N. E. 364.

53. **False Pretenses**—Definition.—The word "obtain," as used in Gen. Code, § 13104, includes, not only the getting, securing, or appropriating of money or property as owner, but an acquisition by way of a loan.—Tingue v. State, Ohio, 108 N. E. 222.

54. **Fraud**—Representation. — Purchaser of timber land, to whom seller represented that it contained a certain acreage, which could not be ascertained by inspection, held entitled to rely on such representation, without further investigation.—Worcester v. Cook, Mass., 108 N. E. 511.

55. **Game**—Dealers in.—Act No. 47 of 1914, § 8, under which sportsmen may hunt game between November 1st and February 15th does not conflict with section 11, permitting dealers to sell certain game between December 15th and February 15th.—State v. Gaspar, La., 67 So. 348.

56. **Health**—Governmental Agency. — The health board of the city of Detroit is a state governmental agency, and its employes need not pass the examination required by the civil service act of the city.—Civil Service Commission of City of Detroit v. Engel, Mich., 150 N. W. 1081.

that accused had murdered him and that he hoped that the people of the county would see that the accused was dealt with justly is inadmissible.—Autrey v. State, Ala., 67 So. 237.

59. **Husband and Wife**—Laches.—One asserting under a marriage settlement an equitable right to support out of the income of lands held by others for 30 years, he having been of age for 10 years, is barred by his own laches.—Dallas Compress Co. v. Smith, Ala., 67 So. 289.

60.——Public Policy.—A contract of separation, which contained a false statement and undertook to divest the wife of all interest in her husband's property, giving her nothing in return, held against public policy and void.—Speiser v. Speiser, Mo., 175 S. W. 122.

61. **Indictment and Information**—Practice.—The action of the court in excusing one placed on the grand jury through mistake, and calling the one intended and excusing him, and placing the next man on the list on the jury did not render the grand jury illegal.—Ex Parte Rogers, Ala., 67 So. 253.

62. **Insurance**—Accident.—Insured in an accident policy could not recover for an injury resulting from a voluntary fight with another.—Hutton v. States Accident Ins. Co., Ill., 108 N. E. 296.

63.——Condition Precedent.—Under a life insurance policy making it a condition precedent to recovery that proofs of death be furnished as required therein, a failure to furnish such proofs, without claiming or showing any excuse, defeats a recovery.—American Nat. Life Ins. Co. v. Rowell, Tex., 175 S. W. 170.

64.——Estoppel.—Where an insurer agreed to and made an indorsement on the policy, naming the first beneficiary's sister as the beneficiary, it was bound by it, even though the request to do so was not made on the form provided by it.—American Nat. Ins. Co. v. Burnside, Tex., 175 S. W. 169.

65.——Material Representation.—Representation by applicant for insurance that automobile was 1910 model, when it was a 1907 model, held material to the risk as a matter of law within Rev. St. 1909, § 7024.—Smith v. American Automobile Ins. Co., Mo., 175 S. W. 113.

66. **Intoxicating Liquors**—Keeping.— Under Rev. St. 1909, § 7227, persons in possession of beer in barrels as servants of the purchaser were "keeping" it, provided they knew that they were transporting beer to the purchaser.—State v. Brown, Mo., 175 S. W. 131.

67. **Judgment**—Reduction of.—Maker of note, against whom judgment was obtained, may not obtain reduction by the amount received by the payee holding as collateral a second mortgage of surplus proceeds of foreclosure of first mortgage.—Carter v. Exchange Trust Co., Mass., 108 N. E. 359.

68. **Landlord and Tenant**—Notice.—A landlord showing title in himself, and who, having given the notice necessary to terminate the tenancy, had a right to the possession at the commencement of his suit, held entitled to judgment.—Harris v. Hill, Ala., 67 So. 284.

69. **Libel and Slander**—Newspaper Article.—A newspaper article, charging the slayers of one accused of murder with lynching, held a libel on plaintiff, though his name was not mentioned. Chapa v. Abernethy, Tex., 175 S. W. 166.

70. **Mandamus**—Insolvency Proceedings. — A purchaser of the property and franchises of an electric lighting plant in insolvency proceedings could be compelled by mandamus to operate the plant for the benefit of the public.—State v. Benson, Miss., 67 So. 214.

71.——Petition For.—On report by a single justice who, after hearing on an agreed state-

Ex parte Atlantic Coast Line R. Co., Ala., 67 So. 256.

73.——Delegable Power.—The rule that a mine operator cannot delegate the duty imposed on him by Rev. St. 1909, § 8445, to provide sufficient ventilation, held not to prevent him from requiring that the employe cut a hole necessary to the proper ventilation of his place of work.—Perry v. Northwestern Coal & Mining Co., Mo., 175 S. W. 140.

74.——Evidence.—Though plaintiff could not read, evidence that he accepted checks marked in full for labor for the balance defendant claimed he owed was admissible in determining whether there was a contract to pay extra for Sunday work.—Wiefenbach v. Lamp, Iowa, 150 N. W. 1045.

75.——Guarding Machinery.—In an action for death of a servant injured by unguarded set screws, held that defendant was not liable if sunk screws in use when deceased began work were changed to set screws without defendant's knowledge.—Winn v. Town of Anthon, Iowa, 150 N. W. 1036.

76.——Inspection.—A temporary staging, furnished by defendant's servants and not dangerous or complicated, held not an instrumentality which it was the master's absolute duty to furnish or inspect.—Berg v. Pittsburg Const. Co., Minn., 150 N. W. 1092.

77.——Negligence.—Act of superintendent, in directing a bricklayer at work on a scaffold to go on the wall known by superintendent to be dangerous and adjust in place an iron plate, held negligence under the Employers' Liability Act.—Wittgren v. Wells Bros. Co. of New York, N. Y., 108 N. E. 213.

78.——Promise to Repair.—The rule that an employe using defective machinery after promise to repair assumes the risk is not controlling, where no definite time was fixed for the repairs, and the employe relied on assurance that repairs had been made.—Wheeler v. Chicago & W. I. R. Co., Ill., 108 N. E. 330.

79. **Mortgages**—Attorney Fees.—A provision of a mortgage, for payment of attorney's fees on collection "by foreclosure or otherwise," held not to require payment of attorney's fees where collection was not by foreclosure, though made by an attorney.—Roessler v. Armstrong, Fla., 67 So. 229.

80.——Foreclosure.—Where the wife of the owner of certain land subject to deeds of trust executed by his grantor was not made a party to suits to foreclose, the foreclosure decrees were not void, but there was a mere outstanding right in the wife to redeem.—Bigoness v. Hibbard, Ill., 108 N. E. 294.

81. **Municipal Corporations**—Assessments.—Local Improvement Act, §§ 57, 58, as amended by Laws 1913, p. 166, permitting the board of local improvements to make a reassessment where the assessment for a local improvement has been declared void, held not to violate Const. art. 9, § 9.—City of Lincoln v. Harts, Ill., 107 N. E. 725.

82.——Assumption of Risk.—A motorcycle ridan approaching motor truck on the right side an approachin motor truck on the right side of the street, could assume that the truck would continue on that side,—Elgin Dairy Co. v. Shepherd, Ind., 108 N. E. 234.

83.——Ordinance.—On a question of the reasonableness of a city ordinance requiring the consent of the majority of the residence owners in accordance with frontage, evidence tending to show that the erection of billboards is productive of fire, and that residence districts are not so well protected as the business district, is admissible.—Thomas Cusack Co. v. City of Chicago, Ill., 108 N. E. 340.

84.——Paving Contracts.—Where the lowest

the firm were collected gives him a reasonable time to pay the amount.—Hink v. Smith, Iowa, 150 N. W. 1069.

86. **Physicians and Surgeons**—License.—Board of medical examiners, having received money paid under protest for a license as an itinerant physician, had no authority to agree to return the same if the law was declared unconstitutional.—Longstaff v. State, S. D., 150 N. W. 1100.

87. **Principal and Agent**—Disqualification.—That the purchaser of land, before buying, had talked with the owner's agent about getting his help in selling the timber on the land, and had paid him something therefor, did not, as matter of law, disqualify the agent from further representing the owner.—Worcester v. Cook, Mass., 108 N. E. 511.

88.——Scope of Power.—Where a proprietor negligently permits a person to be in apparent charge of his place of business, he cannot take advantage of the imposter's lack of authority.—Miltonberger v. Hulett, Mo., 175 S. W. 111.

89. **Principal and Surety**—Apportionment of Loss.—One becoming a surety with others impliedly contracts to contribute his proportion according to the number of sureties, but equity will apportion the loss among solvent sureties.—Trego v. Cunningham's Estate, Ill., 108 N. E. 350.

90.——Notice.—Where an employer discovers dishonesty of his employe and fails to give notice thereof to the surety on his bond, the surety is not liable for subsequent defaults.—Alabama Fidelity & Casualty Co. v. Alabama Fuel & Iron Co., Ala., 67 So. 318.

91. **Quieting Title**—Service by Publication.—Where, in a suit to quiet title, certain heirs of the common source were served by publication only, and did not appear, the court, having found that plaintiff was a tenant in common only, properly dismissed the suit without prejudice to his claim for improvements, less rents and profits, etc.—Terry v. Unknown Heirs of Gibson, Miss., 67 So. 209.

92. **Receiving Stolen Goods**—Evidence.—On a trial for receiving stolen goods the state may prove that on information received officers found a toy at accused's house, and identify it as one taken from the house burglarized without going into details.—Barker v. State, Tex., 175 S. W. 151.

93. **Remainders**—Right of Action.—In equity, a remainderman need not sue until his interest falls into possession, unless the alleged wrong is presently efficient, according to the limitations of the title under which he claims, to cut off his interest in the remainder.—Dallas Compress Co. v. Smith, Ala., 67 So. 289.

94. **Sales**—Acceptance.—Where the seller delivers cross-ties at a point specified in the contract, he may recover for the buyer's failure to accept the ties so delivered, though the contract is not sufficiently certain as to the quantity of ties to be delivered.—American Tie & Timber Co. v. Naylor Lumber Co., Ala., 67 So. 246.

95. **Slaves**—Collateral Kindred.—Under Kirby's Dig. § 2638, and Act Feb. 6, 1867 (Laws 1866-67, p. 99) § 3, the collateral kindred of a decedent who was born a slave, and who traced their descent from decedent's mother who was twice married, might inherit from decedent.—Wilson v. Storthz, Ark., 175 S. W. 45.

96. **Specific Performance**—Discretion.—Specific performance rests in chancellor's sound discretion, to be exercised as equity may require; but it is not an arbitrary discretion.—Africani Home Purchase & Loan Ass'n v. Carroll, Ill., 108 N. E. 322.

97.——Equity.—A contract to purchase corporate stock may be specifically enforced by the seller, where the difficulty of ascertaining the value of the stock renders the remedy at law

99. **States**—Appropriations.—An appropriation for an exhibition at an exposition cannot be sustained as an appropriation for necessary expenses of the government by analogy to appropriations for the bureau of agriculture, mining, and manufacturing, which is expressly provided for by Const. art. 10.—Belote v. Coffman, Ark., 175 S. W. 37.

100. **Street Railroads**—Burden of Proof.—One suing a street railway company for injuries by a defect on a street occupied by the company held required to show that the place of the accident was within the limits of the city at the time of the adoption of an ordinance authorizing the maintenance of a street railway and imposing the duty to keep the portion of the streets occupied by a street railway in good repair.—Brun v. P. Nacey Co., Ill., 108 N. E. 301.

101.——Negligence.—Failure of street car company to provide headlight sufficient to cast a light for the distance within which the car can be stopped or running of car that it cannot be stopped within the distance lighted by the headlight held negligence.—Montgomery Light & Traction Co. v. Baker, Ala., 67 So. 269.

102.——Rate of Speed.—The driver of a buggy crossing a street car track can rely upon the assumption that a car is not exceeding a lawful rate of speed, in the absence of notice or knowledge that it was exceeding the speed limit.—Union Traction Co. v. Cauldwell, Ind., 107 N. E. 705.

103. **Taxation**—Inheritance Tax.—Inheritance Tax Act, § 21, in view of Hurd's Rev. St. 1913, c. 36, is invalid, so far as it allows the treasurer of Cook county commissions in excess of the salary prescribed by Const. art. 10, § 9, Fees and Salaries Act, § 31.—Jones v. O'Connell, Ill., 107 N. E. 731.

104.——Succession Tax.—The devolution of debts owed by residents and of stocks of national banks located in Minnesota is subject to the succession tax, though the debts were owing to and the stock held by nonresident decedents.—State v. Probate Court of St. Louis County, Minn., 150 N. W. 1094.

105. **Tenancy in Common**—Election.—Where a tenant, in common acquires an outstanding title, tenants must elect within a reasonable time to adopt the purchase and contribute their portion of the expense, or to repudiate it.—Brown v. Howard, Mo., 175 S. W. 52.

106. **Trusts**—Executed Conveyance. — Under deed conveying land in trust, income to be paid to grantor and property to vest in his heirs at his death, held that there was a complete, executed conveyance for the use of such persons as should constitute his heirs.—In re Tolerton's Estate, Iowa, 150 N. W. 1051.

107.——Misconduct.—That one-third of the income from trust property was expended for betterments on the trust property does not show misconduct on the part of the trustee, where no items were shown to have been improper.—In re Weller's Estate, Ill., 108 N. E. 306.

108.——Negligence.—A corporation allowing its treasurer to use its money to purchase property taken in his own name held chargeable with such culpable negligence as to estop it from establishing a resulting trust therein as against one who had loaned money on the faith of the treasurer's apparent ownership.—H. C. & W. B. Reynolds Co. v. Reynolds, Ala., 67 So. 293.

109. **Usury**—Estoppel.—A subsequent purchaser, who has expressly assumed payment of a mortgage as part of the price, is estopped to defend against foreclosure on the ground of usury.—Powell v. Petteway, Fla., 67 So. 230.

110. **Vendor and Purchaser**—Liquidated Dam- Vendor and purchaser may agree that

sale under the settlement.—Dallas Compress Co. v. Smith, Ala., 67 So. 289.

112.——Parol Agreement.—Parol agreement by vendor, who contracted to convey free from incumbrances, to pay a mortgage is part of the consideration for a subsequent acceptance of a deed and transfer by purchaser of the consideration.—Burk v. Brown, Ind., 108 N. E. 252.

113.——Possession.—Where, at time payment was to be made and deed delivered, the abstract was defective, but purchaser took possession pending the perfecting of the title, he is liable for the specified payment and for interest thereon until the payment was made.—Kretzinger v. Emering, Iowa, 150 N. W. 1038.

114. **Waters and Water Courses**—Easement.—Owners of lots, with easement for unobstructed flow of water diverted into one channel by dam, held entitled to remove obstructions placed in such channel, even though one of them was using water on land other than the lots to which it was appurtenant.—Allott v. American Strawboard Co., Ill., 108 N. E. 284.

115. **Wills**—Conjoint Will.—Where a conjoint will by two persons gave the survivor only a life estate with remainder over to a third person, the instrument may successively be proven upon the death of each as his individual will.—Rastetter v. Hoeninger, N. Y., 108 N. E. 210.

116.——Construction.—A devise to testator's son with provision that on his death before his youngest child is 16, the property shall be a home for his wife and children, includes children of a second marriage.—Sutton v. Greening, Ky., 175 S. W. 1.

117.——Contest.—Where executors, defendants in a will contest, appealed from a judgment of the circuit court denying the validity of the will, the appointment of an administrator by such court before the final determination of the appeal was improper.—Dinwiddie v. Shipman, Ind., 108 N. E. 228.

118.——Gift to Class.—A "gift to a class" is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal, or in some other definite proportions.—Volunteers of America v. Pierce, Ill., 108 N. E. 318.

119.——Lost Will.—A verbal variance between a lost will, as set out in a petition for its probate, and the proof of its contents, will not preclude probate, where the substance is the same.—Allen v. Scruggs, Ala., 67 So. 301.

120.——Partition.—In action to partition land devised in remainder to children, subject to certain charges, child, charge against whom exceeded his share of all the charges, held not entitled to his share in the charges as against the holder of a sheriff's deed to his interest.—Baker v. Terrell, Iowa, 150 N. W. 1065.

121.——Remainder.—Where a father devised land to his daughter for life, the will reciting that after her death the property should be equally divided among his children, the death of the daughter merely fixed the time for the remainders to come into possession and not the time when the class entitled to take should be determined.—Lynn v. Worthington, Ill., 107 N. E. 729.

122. **Witnesses**—Cross-Examination.— Where the state examines its witness as to his reasons for leaving another state, defendant's counsel may, on cross-examination, ask the witness whether there is a charge of murder pending against him in the state whence he came.—State v. Barnes, La., 67 So. 349.

123.——Waiver.—One voluntarily testifying at a hearing of charges in connection with a nomination at a judicial convention did not waive his right to decline to testify on a subsequent

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SERVICE ON RESIDENT OFFICER OF FOREIGN CORPORATION DOING NO BUSINESS IN A STATE.

The federal supreme court reverses the Supreme Court of North Carolina in its holding that a judgment against a foreign corporation based solely on service of a resident director, the corporation carrying on no business in that state, was valid. Riverside & D. R. Cotton Mills v. Menefee, 35 Sup. Ct. 579.

The state supreme court, two of its members dissenting, arrived at its conclusion from a consideration of the cases of Goldey v. Morning News, 156 U. S. 518, and Conley v. Matthieson Alkali Works, 190 U. S. 406, planting itself on an observation in the former case and repeated in the latter, that: "Whatever effect a constructive service may be allowed in courts of the same government, it cannot be recognized as valid by the courts of any other government," and it was said that under North Carolina statute "the service is sufficient for a valid judgment, at least, within our jurisdiction." It was further observed that: "What opportunity or method the plaintiff may have to enforce his judgment is not before us now for consideration."

The Chief Justice spoke of Pennoyer v. Neff, 95 U. S. 714, often reaffirmed, as establishing the principle that it is not due process of law to condemn the resident of another state when neither his person or his property is within the jurisdiction of a court, and of its being settled by St. Clair v. Cox, 106 U. S. 350, that a foreign corporation which has not come into a state

a corporate officer in the state either temporarily or permanently, if transacting no business therein, made no difference as to the application of such principle.

But it was contended by state court that these cases merely referred to the right of enforcement of, and not the power to render, judgment, as was implied by the Goldey and Conley cases. The court in answer to this contention said: "The obvious answer to the proposition is that wherever a provision of the constitution is applicable, the duty to enforce it is imperative and all-embracing, and no act which it forbids may therefore be permitted. If the suggestion be that, although under the jurisdiction which was exerted, in form a money judgment was entered, as no harm could result until the execution, therefore no occasion for applying the due process clause arose, it suffices to say that the proposition but assumes the issue for decision, since the very act of fixing by judicial action without a hearing a sum due, even although the method of execution be left open, would be, in and of itself, a manifestation of power repugnant to the due process clause."

This argumentation is somewhat hard to follow. If a foreign corporation is without a state, but constructive service may be had upon it if it has property in a state, why may not a state statute authorize a judgment against it so it may be enforced as to ownership of property therein which may come about in the future?

The Chief Justice concedes that the cases where judgments were rendered without due process of law being observed were where attempts were made to enforce them in jurisdictions other than where they were rendered and, obviously, all that was necessary to be decided was that there the judgof did not exist at the very time judgment was rendered. Cases like Pennoyer v. Neff said this and, though the other question was not necessarily involved, yet they were upon the theory that at the very time of rendition of judgment there existed no jurisdictional basis therefor. One's acquisition of property or subsequent carrying on of business ought not to be subject to a rule, that this will bring a judgment into force which otherwise would be void for want of jurisdiction.

This is different from bringing property into a situation where a judgment, valid on jurisdictional grounds at the time of its rendition, may be enforced. Purely cursory or accidental things, having no real relation to status at the time a judgment is rendered, ought not to interfere either with the free right of contract or the free right of removal from one state to another. Interrelations between citizens of different states ought to be encouraged rather than hampered. There, too, is a decided advantage gained by plaintiff in such a case, so far as extending the life of a debt is concerned.

NOTES OF IMPORTANT DECISIONS

BANKS AND BANKING—PAYMENT IN FORGED INDORSEMENT, BINDING ON DRAWER WHERE NOT PROMPTLY OBJECTED TO.—The case of Lesley v. Ewing, 93 Atl. 875, was decided by Pennsylvania Supreme Court upon a question of estoppel wrongly, as it seems to us, applied.

The facts show that in 1907, plaintiff loaned money upon a forged mortgage giving a check for the amount payable to the supposed mortgagor. Payee's name was forged by indorsement on the check and it was collected at bank. In July, 1911, the drawer was told that the mortgage was a forgery and in October thereafter he received from the bank his cancelled checks. In December he notified the bank that the indorsement was forged. The court said he was estopped from recovering

The rule as to estoppel against a depositor arising out of possession of cancelled checks is where his name as drawer has been forged. He is not supposed to know the signature of payee or of any other who indorses same. The bank on which a check is drawn has to see that indorsements are genuine.

But the court says, that the drawer having positive knowledge of the mortgage being a forgery, "he must have known that the check payable to the order of the mortgagor had been negotiated without authority."

We do not see that this is necessarily true and against its being true is the fact, that a bank knowing the signature of the drawer is bound to satisfy itself as to the genuineness of indorsements.

Further than this, it appears that drawer was ignorant of every circumstance of a fraudulent nature for four years and taking it that there was no notice to the bank for six months thereafter, this delay would not seem *prima facie* to have damaged the bank.

The rule of prejudice in such cases is applied rather as to subsequent checks than as to those already paid, e. g., where there are repeated forgeries of a depositor's name and he has recognized or made no objection against forged checks charged up against him. Here was but one check and that had been paid long before by the bank which was bound at the time to ascertain that it was properly indorsed.

There is no rule as between a bank and a depositor as to the genuineness of indorsements. The bank has every means to protect itself as to them, and no silence by a depositor can be supposed to have misled it. But, if a depositor really obtains the security for which a note with a forged indorsement was given, in such case he is estopped. Dyens v. Bank (Tex. Civ. App.) 148 S. W. 1127.

LIBEL AND SLANDER — MOVING PICTURE AS LIBELOUS.—From Merle v. Sociological Research Film Corporation, 152 N. Y. Supp. 829, decided by Appellate Division, New York Supreme Court, we learn that "a suit for libel based on a moving picture production is a somewhat novel proceeding," and that "there is no doubt that if the production tends to bring a person into disrepute it may give rise to such an action."

hardly might be thought to be novel, in the sense, at least, that contention of the right to bring such a suit is novel.

There might in such a suit be more difficulty in determining whether such a libel is directed solely against one personally or against his business or whether it is to be taken in both aspects, than where a libel is in written or printed words, and whether one should have more than one count in his petition when he sues for such a libel is suggested.

This case also shows that in about every case of a libel by a moving picture the surroundings have to be taken into consideration to ascertain whether there was any libel, and it is said: "Reasonable inferences which can be drawn from the picture cannot be extended by innuendo."

The case was the showing of plaintiff's name on a building in a moving picture film of a play called "The Inside of the White Slave Traffic," it being thereby indicated that at his place of business this traffic was carried on. It was thus only by association that anything of a libelous nature was inferred. A case was held to have been stated by the petition and that there was a libel against plaintiff of a personal nature.

LARCENY—DESCRIPTION OF PROPERTY. —In Graham v. State, 84 S. E. 981, decided by Georgia Court of Appeals, it was said: "While the indictment described the cow as 'one blue and white speckled' cow, this description would include equally well a cow which was black and white speckled, since it is a matter of common knowledge that, literally speaking, no cow on this mundane sphere is actually 'blue,' though cows of that color may possibly browse through the valleys of the moon, graze along the banks of the canals that seam the face of the planet Mars, or disport themselves in the realms of fairyland."

Perhaps it would have been better to have considered the words "blue and" as omitted from the indictment as being falsa demonstratio, which in law does not hurt, and by doing this a precedent might have been set for some courts which have held indictments bad for omission of "did" and "the" and such words as leave the clear intent of the indictments wholly

EVIDENTIAL QUALITY AND CAPACITY.

Where the result of a judicial trial depends on facts which are in dispute, the dispute (in a very general sense) may be said to be settled by the hearing and consideration of the conflicting evidence of persons claiming to have some personal knowledge of the matter in controversy; and this is done under the supervising control of a disinterested presiding judge. In such abstract case, every witness acts but in a single capacity and his acts are of but a single quality, so far as the case is concerned; usually he merely gives his recollection regarding some past event with which he was personally connected. From the combined, and perhaps contradictory, versions of the various witnesses, the jury then decides what were really the occurrences constituting such event.

Such is the simplest form of procedure, and necessarily it is frequently modified by reason of various complicating conditions, or legislative enactments, or judicial rulings, which are encountered from time to time. For instance:—One of the strangest modifications has existed in Tennessee for nearly a century past, whereby the presiding judge is a competent witness in any case being tried before himself, whether it be a civil or criminal proceeding. In one case the judge himself presented the charges against an attorney, provided the evidence to support them, and then heard, and disposed of, the consequent disbarment proceeding.[1]

The more frequent variations in the simple procedure, however, cluster around the debatable ground between the unquestioned realm of fact, on one side, and the admitted region of opinion, on the other side. The [illegible] opinion finds its sole eration; such opinion must, of course, be based on specific facts derived from some source or other,—hence the chance for confusion.

In our dictionaries, "opinion" is variously defined as "A conviction founded on probable evidence," or "Belief stronger than impression, but less strong than positive knowledge." Sir Matthew Hale said "Opinion is when the assent of the understanding is so far gained by evidence of probability, that it rather inclines to one persuasion than to another, yet not without a mixture of incertainty or doubting."

In its ultimate analysis every statement of a fact is but an expression of the speaker's opinion or belief regarding certain phenomena that have presented themselves to his senses. Yet, practically, when a person says, "Smith passed me on the street today," or, "I saw a drunken man fall over a cellar-door yesterday," we accept that as a statement of fact, although he only *believes* that it was Smith, or that the man was drunk. The highest court in Georgia has even held that testimony to the effect that the deceased "*generally* laid his hat aside when he sat down for a conversation, and lit his pipe to smoke;—he *generally* laid his hat where I saw it that night," was evidence of fact, and not mere opinion.[2]

From this point to where the witness is admittedly only expressing an opinion, having but probative force as such, is a long distance. Well-defined rules govern the testimony of witnesses at each end of these extremes; and we generally find the respective witnesses testifying purely in one way or the other, so that the rules are easy of application.

Unimpeached testimony of not improbable *pure fact,* given by a disinterested credible witness, must be accepted at its face value; unimpeached testimony of the *pure opinion,* of a competent witness, need only established, and when such opinion on those facts is believed to be reliable. Thus, in an accident case, the opinion of a doctor given in reply to a hypothetical question, is to be accepted only when the facts in the question have been found to be correct, and the opinion seems trustworthy;[3] and in a forgery case, if the papers containing the facts on which the expert opinion has been based, are later ruled out, then the expert opinion must also be stricken out.[4] The facts may have been already excluded, when offered as a basis for a non-expert opinion, and yet later be admitted as a basis for expert opinion.[5] This case turned on the sanity of the defendant, and the evidence of ordinary witnesses, as to his conduct, was ruled out because those witnesses were unable to form therefrom any opinion as to his sanity; later, however, such testimony was admitted and used, as a basis for opinions given by other witnesses who were experts.

Thus the opinion testimony must be founded on facts also in evidence, and these facts may come from a variety of sources. They may be derived from ordinary witnesses having a personal knowledge of them, from merely hearing or seeing certain events; or they may be such as are only capable of ascertainment or observation by one having a special skill in, or knowledge of, the subject matter, as in scientific questions. In the former case, the witness may be either specially trained in the particular line of investigation, or he may be entirely untrained therein; in the latter case the witness must of necessity be an expert therein, by training or practice; but, in both cases, the testimony is of *fact* and subject to the rules governing such evidence, both as to the responsibility resting on the witness and the weight to be given to his statements.

That this view is correct may be gathered from various extra-judicial utterances of two most eminent Pennsylvania jurists, —Judge Penrose, of Philadelphia, and Judge Endlich, of Reading; it is also tacitly recognized by the Pennsylvania Supreme Court.[6] In this connection the real test is, the *substance* to which the witness *testifies,* and not merely the *form* in which he *qualifies* as a witness;—*what* he actually says, and not merely *why* he was enabled to say it.

The facts having been gotten in evidence, the next step (in a proper case) is the receiving of opinions of competent witnesses, based on such facts. It is strange, but yet true, that the law inconsistently accepts pure opinion evidence from both skilled and unskilled, expert and non-expert, witnesses; the principal distinction is that the non-expert must also furnish his own facts, while the expert may or may not do so. This difference at once brings us face to face with a mixed, or dual, evidential capacity, which question can be most profitably examined from the standpoint of a single line of judicial inquiry,—e. g., the broad ground of a disputed writing.

In 1862, Judge Woodward of the Pennsylvania Supreme Court, attempted to review and reconcile the many and conflicting Pennsylvania decisions on proof of handwriting, and as a result concluded that (a) Non-experts who produced their own facts,—to-wit, their personal knowledge of the party's handwriting,—could then give their opinions whether or not the disputed writing was by such party, but could not compare genuine writings with the disputed, and give their opinions thereon. (b) Experts could give their opinions as to whether or not the disputed writing was forged or simulated, but could not compare same with any genuine writings and give an opinion thereon; if such witnesses had any personal knowledge of the party's handwriting, they were thereby disqualified from giving expert opinions. As the experts could make no comparisons, they of course could ascertain or present no facts, but only their bare conclusions of scientific skill.[7] And under this case, the determining comparison could only be made by the jury.

Although much of the opinion in Travis v. Brown was mere dictum, the inferior Pennsylvania courts quite generally accepted its reasoning for many years,—probably more because of its convenient codification of conflicting prior decisions into a few simple general rules, than because of its binding authority. But when the appellate courts were brought face to face with the reasoning contained in the dictum, the dictum has had little, if any, weight given to it, as affecting expert testimony in cases involving either handwriting or other matters.

A witness may state *facts* within his personal knowledge or observation, and then (if competent) give his *expert opinion* on those facts; or his opinion may be based on those facts, taken in conjunction with facts testified to by other witnesses.[8]

The Pennsylvania Act of May 15, 1895, P. L. 69, (amended June 6th, 1913, P. L. 451), permits experts to make comparisons between genuine and disputed writings, and to state the details of their work to the jury. This Act enables the expert first to ascertain, through his skill, numerous data to be gained only by comparison of the writings—*all facts;* and second, to place those *facts* before the jury; and third, to formulate and base a technical *opinion* upon those facts. While the jury is still left as the arbiter of *disputed* facts and opinions, the Act does not leave to the jury, for decision merely by *its own comparison* of the writings, the question of handwriting involved; this must be determined by all the evidence in the case.

As Judge Endlich said in 1897:[9] "Where from the facts so stated, the drawing of the inference requires special knowledge, the inference is then to be drawn not by the jury, but by an expert witness. In such case the expert inference may be drawn from facts admissible even in the absence of expert testimony, or from facts which would have no significance at all for the jury in the absence of expert testimony and therefore admissible only as laying ground for the expert testimony."

It is reversible error for the trial judge to so charge the jury as to give the jurymen the impression that a disputed question of handwriting may be determined by them from a comparison of the handwriting made by themselves, and from that alone.[10]

Consequently, whether it were then correct or not, as stated in 1862, in Travis v. Brown, that "an expert speaks from no knowledge of the particular facts which he may happen to possess, but is to pronounce the judgment of skill upon the particular facts proved by *other* witnesses," and that the question is to be finally settled by a comparison made by the *jury alone,* such is not now the law in Pennsylvania.

There, and now, a writing may be proven by three varieties of testimony: 1. By the evidence of *any* witness who actually saw it written and who therefore testifies entirely to *fact;* or 2. By the evidence of *any* witness who had theretofore become acquainted with other handwriting of the supposed writer, whereby he is in a position to be more or less able to recognize it when he sees it, although he did not actually see the questioned writing done; in which case his testimony as to his acquaintance, is of *fact,* while his evidence as to the authorship of the writing in dispute is merely *opinion:* amination or test of the writing in dispute, or from a skilled comparison of such writing with others admitted to be genuine. In such cases, the statement by the witness of the details of his examination or comparison, and of his data, is all evidence of pure *fact,* while his statement of his final conclusion (based on such data) is pure *opinion.* In testifying to such facts, the witness speaks as an ordinary witness though only his scientific knowledge has taught him how to ascertain those facts; but in expressing his opinion based on such facts, he speaks technically only as an expert.[11] Some of the facts so stated may be visible in the writing to the jury, while others may only be observable by the skilled use of suitable instruments; yet *all* are equally facts when stated by the witness.[12]

It will thus be seen that a *non*-expert who is merely "acquainted" with the general hand of the person whose writing is in question, testifies in a dual capacity,—i. e., partly to fact, and partly to unskilled opinion, the quality being generally very weak along both lines, by reason of the lack of intelligent acquaintance on the part of the witness, and of the necessity for him to rely upon something intangible for assistance, viz.,—a more or less imperfect memory.

When the proof is by an *expert* witness, he, too, acts in a distinctly two-fold capacity, giving his data as an ordinary, though skilled, witness to facts, and his opinion as a true technical expert. Under the dictum expressed in Travis v. Brown, such witness could only state his *opinion,* and not that if he had any personal knowledge—however derived—of the admitted handwriting of the party in question; now, however, he may quaintance with the general handwriting of the party in question; in fact he may now (if competent) testify in a four-fold capacity:—as a non-expert "acquaintance" witness to fact and then to opinion, and as an expert witness to the scientific facts and then to his scientific opinion thereon.[13]

The importance of bearing in mind the distinctions among the several sorts of capacity, lies in the different rules of law governing (a) the weight to be given to testimony of fact on the one hand, and to mere opinion on the other hand, and (b) the degree of responsibility—as to perjury—under which each kind of testimony is given. An observance of these distinctions definitely, and with good reason, raises the standard of all such evidence.

Of course, "acquaintance" with the handwriting of the supposed writer is not to be gained from a course of instruction given to the witness in anticipation of, and to prepare him for, giving such testimony in the particular case. In other words, it must not be derived from a premeditated and designed exhibition of the act of doing such writing, given at or about the time of the trial; the "acquaintance" must have been had prior to, and outside of, the circumstances of the immediate controversy.[14]

With regard to the *quality* of the testimony given by *experts*, it is to be remembered that the Pennsylvania Act of 1895, ante, defines experts as (a) "those who have had special experience with" or (b) "who have pursued special studies relating to," writings, etc. This creates a double classification, and a given witness may be found to be in either or both classes. If only in the first class,—as in the case of the average bank teller or cashier,—the quality of the evidence is lowered; if in both classes, then the quality is materially raised. The difference rests not on rele-

spective mental processes in considering the question.

Most bankmen's opinions concerning signatures on papers presented to them in the regular course of business, depend, very slightly, on a species of intuitive recognition of the signatures, and, slightly more, on the appearance and behavior of the person presenting the signature and the probability of the transaction, but, principally, on either the *identification* of the individual bringing in the paper, or the *guaranty* of the signature by the bank presenting the paper. This condition can give rise to but a frail claim to expertness with regard to anybody's handwriting; and outside of this their claim thereto rests only on the fact that *many* signatures of *many* people pass under their notice. Mere *numbers* cannot bestow special skill, otherwise the poor laborer who merely carried mortar or bricks up a scaffolding would, of course, be an expert in such building materials.

On the other hand, if the witness had not only handled much writing, but had also made a careful and extended study or investigation of writings, as such, it is but natural that his judgment concerning a given writing would rest on a broad foundation contained in the very writing itself, and dissociated from all extraneous circumstances and conditions. Such a witness would judge the writing by itself alone, and on some definite and ascertainable basis, independently of mere surmise or intuition.

Therefore, the evidential capacity of a given witness while testifying in a given case, may continue as it began, or it may shift around from time to time, from that of non-expert to expert witness, and from that of a witness to fact to one merely giving an opinion. The quality of the testi-

ATTORNEY AND CLIENT—PRACTICE OF LAW BY CORPORATION.

L. MEISEL & COMPANY, Plaintiff-Respondent, v. NATIONAL JEWELERS BOARD OF TRADE, Defendant-Appellant.

Supreme Court of New York, App. Div. April 28, 1915.
152 N. Y. Supp. 913.

A membership corporation organized as a Board of Trade "for purposes other than pecuniary profit," has not the right to represent a creditor in a bankruptcy proceeding, or to appear on behalf of a creditor in the matter of the general assignment of a bankrupt for the benefit of creditors, or to advise a creditor in such proceedings, or to do the things appertaining to the prosecution of the creditor's claim, or protection of his interests in such proceedings, making a charge for such services. Such services constitute legal services.

SHEARN, J. This case presents for determination a question which has been very generally discussed during the past year, namely, what amounts to the practice of law on the part of a corporation. The respondent Meisel, doing business under the name of L. Meisel & Company, went to the office of the appellant, the National Jewelers Board of Trade (a New York membership corporation), in 1913, and asked it to collect a claim which he had against one F. W. Wedgren, who was in bankruptcy. Respondent was informed that Wedgren was in bankruptcy and that it would be necessary for him to file a claim in bankruptcy with the appellant to enable it to collect the claim. Respondent was instructed to bring to the appellant the notes representing the claim, together with a statement of his claim, which he did. Then the appellant gave Meisel certain papers to sign, which were prepared in its office. These papers were a proof of Meisel's claim in bankruptcy. Thereafter the appellant sent to Meisel a check for $6.76, which purported to be the amount collected on his claim, less $3, charged and retained by the Board of Trade for its services. Meisel did not cash the check and offered to return it to the Board of Trade on the trial, which offer was refused.

Meisel also had a claim against a concern known as the Pacific Jewelry Company and went to see the Board of Trade in regard thereto and requested it to collect the claim. The Trade informed Meisel that the Pacific Jewelry Company had made an assignment for the benefit of creditors. Meisel signed certain papers which the Board of Trade prepared for him, but could not recollect their nature or contents. Subsequently the Board of Trade sent its check to Meisel for $28.06, representing the amount collected by it from said bankrupt, less $3.20 fees. Plaintiff did not cash the check, but tendered it to the Board of Trade on the trial, the tender being refused. At the time of the transactions Meisel was not a member of the Board of Trade.

That the practice of law by a corporation is contrary to public policy and malum in se has been decided by the Court of Appeals (Matter of Co-operative Law Co., 198 N. Y., 479). The sound reasons for so holding were fully and convincingly stated therein by Judge Vann (pp. 483-4) and need not be repeated. That the practice of law by a corporation is malum prohibitum is obvious upon a mere reading of Section 280 of the Penal Law.

In determining whether the transactions herein disclosed constituted the practice of law and the furnishing of legal services by the Board of Trade, a sensible and sufficient definition is found in Re Duncan, (1909, 83 S. C. 186, p. 189), 65 S. E. 210.

"It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country it embraces the preparation of pleadings and other papers incident to actions and special proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients, and all action taken for them in matters connected with the law. An attorney at law is one who engages in any of those branches of the practice of law. The following is a concise definition given by the Supreme Court of the United States: 'Persons acting professionally in legal formalities, negotiations or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation, as employed in this country' (Savings Bank v. Ward, 100 U. S. 195).

"Under these definitions there can be no doubt that Duncan engaged in the practice of law."

or performing services in a court of justice, in any manner depending therein, said: "But in a larger sense it includes the legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in court."

That the definition of what constitutes the practice of law stated in Re Duncan, supra, should and will be accepted and applied by the courts in this state is clearly indicated by the cases of Matter of City of New York, 144 A. D. 107, Matter of Bensel, 140 A. D. 944, Aff'd. 201 N. Y. 531; Buxton v. Lietz, 136 N. Y. Supp. 829, 139 N. Y. Supp. 46.

Now, consider the services ordinarily incident to representing a creditor and enforcing his claim in bankruptcy matters, such as the Wedgren case herein involved. The promissory notes required examination as to execution and the form of the signature, i. e., whether the maker was liable in an individual or representative capacity, whether signed in a a trade name as distinguished from an individual name, etc. Inquiry was necessary concerning the inception and delivery of the notes, whether for value or accommodation, and as to any possible defenses, or counterclaims. Acting on this information, the client would be advised whether to proceed. The next step would be the preparation of proof of claim. This is a legal instrument, and the mere fact that it is on a printed form and might be filled out by a layman does not change its character any more than the fact that confessions of judgment, bills of costs, affidavits of service and many simple forms of pleadings on notes and for goods sold and delivered are frequently printed changes their character. The subsequent steps that ordinarily occur, such as joining with one or another group of creditors in the selection of a trustee, expediting or opposing the disposition of the assets of the bankrupt estate, the consideration of proposed compromises, reorganizations and substitution of securities for claims, the various problems incidental to receivership, the form in which dividends are received and receipted for, and innumerable other details intervening between the filing of the petition in bankruptcy and a discharge, all involve at one stage or another proceedings on behalf of the client in courts, the preparation of legal instruments of various kinds, the rendition of legal advice is generally recognized as a special line of legal work. Frequently the relation requires actual appearance in court and the conduct of litigation. That such proceedings are contemplated and provided for by this board of trade in its relations to its clients is shown by its printed form of voucher, containing provision for "costs," "suit fee" and "fees." That the services involved and contemplated by this board of trade in representing plaintiff in the bankruptcy of Wedgren and prosecuting his claim therein were legal services seems too plain to require further consideration. Similarly, in representing him and prosecuting his claim against the Pacific Jewelry Company, whose property was in the hands of a general assignee for the benefit of creditors, the services were legal services, and for the most part similar in kind to those already enumerated. Ordinarily, a proper representation of the creditor in such matters involves an examination of the assignment, consideration of its validity, the sufficiency and form of the assignee's bond, an examination of schedules, alertness against the allowance of improper claims, keeping track of suits brought by and against the assignee, the accounting, and a multitude of other important details that will at once occur to any practicing lawyer.

Appellant cites Matter of Associated Lawyers Co., 134 A. D. 350, as holding that a corporation can act as a collection agency. The court did not so hold. That was an application made under Section 280 of the Penal Law for the approval by the court of the petitioner under the provision that the prohibitions of the section should not "apply to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy, whose existence, organization or incorporation may be approved by the appellate division." The court said :

"It seems to us quite evident that the only authority given to this court is to approve 'organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy.' While it has never been legal for a corporation to practice law, a system has grown up by which corporations undertake to procure attorneys for the transaction of the law business of its clients, and

"We think, therefore, that the granting of this application would be entirely ineffective to allow the petitioning corporation to disobey the provisions of this section and that the court is given no authority to authorize it to continue to perform any act which this statute prohibits."

Accordingly, the petition was denied. It is true that the court added at the end of the opinion the statement that "it is quite clear that, so far as the business of this corporation is confined to the collection of claims without legal proceedings, it is not affected by this statute." This was obiter and unnecessary to the decision. It is by virtue of this dictum that appellant claims that it has been held that a corporation can act as a collection agency. The foregoing statement of the case shows that it was not so held in that case. Even if it had been so held, it would not affect the decision here, for, as has been shown, the services rendered in representing creditors in bankruptcy proceedings and in matters of general assignments for the benefit of creditors are legal services rendered in connection with legal proceedings. All that can be claimed for the dictum is that the court intimated, by way of obiter, its opinion that the mere sending out of dunning letters by a corporation does not constitute a violation of Section 280 of the Penal Law. Furthermore, it is to be doubted that the court would so decide if that question were squarely and properly presented. When it is considered that the corporation that undertakes the collection of claims without suit is generally intrusted with the evidences of debt, with transcripts from its client's private books, with access to its correspondence; and, further, that the statement of the case made by the client involves disclosures which are of a nature that ought to be privileged; when it is considered that the dunning letter is ordinarily preliminary to a suit carried on by a disguised attorney acting as the employe of the corporation; and, finally, when it is realized that the moneys collected belong to the client and ought to be subject to court orders in summary proceedings, there is a good deal to be said in favor of holding that the operation of a collection agency, with or without legal proceedings, constitutes the practice of law. When that case arises good and sufficient reasons for the courts so holding will be the address by Hon. George W. Wickersham, made recently before the Bar Association of Chicago (see N. Y. Law Journal, November 25, 1914); the brief submitted by the committee on unlawful practice of the law of the New York County Lawyers Association, in the Matter of the Application of Charles L. Apfel v. National Jewelers Board of Trade, before the attorney-general; and the report of the attorney-general in the Matter of Charles L. Apfel for the institution of an action to vacate the charter and annul the corporate existence of the National Jewelers Board of Trade, reported in the New York Law Journal, September 14, 1914. It suffices to say here, that we are not dealing with a mere matter of sending out dunning letters, and that the Matter of Associated Lawyers Co., supra, has no application.

NOTE.—*Practice of Law or Medicine by Corporations.*—The American Bar Association, not in any spirit of protection of the profession of law from a pecuniary standpoint, but in furtherance of ideals pertaining to the proper administration of justice, has fought participation in the practice of law by such, as either have little conception of its moral obligations, or can in no way take upon themselves its duties of trust and confidence.

Like the profession of medicine, the profession of law comes under the police power of the state, but it is a mistake to suppose that the exertion of this power finds its sole end and justification, as to the former, in protection of the health of the people, or as to the latter in the securing of orderly procedure in the courts and the consequent saving of expense. There is yet a higher purpose to be subserved, which is just as patently within that power.

With the physician the condition of the possession of moral character is the condition of his applying for the benefit of his patients the remedies of which his license to practice presumes a knowledge, and universal psychology teaches that confidence in that character is a potent aid to their beneficial effect.

With an attorney at law moral character is designed to make an officer of the court its faithful servitor and to inspire in those seeking his services respect for the court and ready obedience to its decrees.

In both professions moral character is the personal attribute that gives security to the seal of confidence, where confidence is necessarily imposed. Just as a physician rarely may give to his patient benefit of his best skill, unless every matter that may affect diagnosis is revealed, so the lawyer must know the secret springs of action to understand his client's case. If a susknowledge to practice law or medicine, and yet made no requirement as to personal character, it would be riding to a fall, so far as beneficent results were concerned. Implicitly, it would be denying intimate relations in life upon which true progress is built and the only success worth prizing is achieved. In addition, it would be to cabin and confine influence of the intellectual accomplishments it requires its servants to possess.

We might go on an argue that such a partial exertion of police power would tend even to dwarf intellectual vigor and ambition for research and study, but this is unnecessary, and by thus philosophizing we might seem to be looking to the individual benefits of the public's servants.

These views seem to be supported by text writers, as see Robbins on Advocacy, Sections 9 and 10, and by many decisions made independently of any statute specifically directed at corporations entering these fields of activity.

Thus, it has been said that: "While a corporation is in some sense a person and for many purposes can be so considered, yet it is not such a person as can be licensed to practice medicine." State Electro Medical Institute v. State, 74 Neb. 40, 103 N. W. 1078, 12 A. & E. Ann. Cas. 673.

This case cited Underwood v. Scott, 43 Kan. 714, 23 Pac. 942, as saying: "The practice of medicine may be said to consist in three things: first, in judging the nature, character and symptoms of the disease; second, in determining the proper remedy for the disease; third, in giving or prescribing the application of the remedy to the disease." Then it says: "There was no necessity of legislation to prohibit corporations, as such, from practicing medicine. It is impossible to conceive of an impersonal entity 'judging the nature, character and symptoms of the disease,' or 'determining the proper remedy,' or giving or prescribing the application of the remedy to the disease. Members of the corporation, or persons in its employ, might do these things, but the corporation itself is incapable to do them. The qualification of a medical practitioner is personal to himself."

While these principles must be admitted to be sound, yet it was held that a corporation might be formed by licensed physicians and it could make contracts for services of physicians to be rendered and collect therefor. This seems to us a most illogical conclusion and against the underlying principle of what is declared by the case. If the right to practice medicine is personal, it is because there is a confidence and a trust in the personality which must be independent, or it is no trust worthy of the name. Besides, if it is a personal trust, it is against public policy to farm it out, so to speak, and certainly this could not be in accordance with ethical view. Do you not endanger what is by the requirement of a license intended to be protected—public health—when a personal trust is made subordinate to a corporation's contract?

Had the court in this case adhered to the underlying reasons in Langdon v. Conlin, 67 Neb

that: "The recognition of contracts of this character would be the introduction of all sorts of fraud and deception in proceedings before courts of justice."

But might not allowing another to control the services and contracts of physicians, at least where the latter are executory, be fraught with danger to health and the violation of confidence reposed in physicians?

New York law authorizes hospitals, etc., organized as corporations to diagnose, treat, operate and prescribe for diseases in the hospital, and it was said such a statute was valid. People v. Woodbury Institute, 192 N. Y. 454, 85 N. E. 697. But this does not touch the question of public policy as to patients not in such institutions. This distinction was stressed by N. Y. Supreme Court in Appellate Division, same case, 124 N. Y. A. D. 877, 109 N. Y. Supp. 578. It was said, "corporations may practice medicine by providing accommodations for patients and facilities for their care and treatment and physicians and surgeons to administer to them," but not otherwise. But though it was held illegal and *ultra vires* for a corporation to carry on the business of dentistry, this did not absolve it from liability for a tort committed by a dentist in its employ. Hannon v. Siegel-Cooper Co., 167 N .Y. 244, 60 N. E. 597, 52 L. R. A. 429.

It was said in Matter of Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, that: "A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it, any more than it can practice medicine or dentistry by having doctors or dentists to act for it," and we take it that all of these are put on the same plane in this regard, but this case referred only to practice of law and we will see what its reasons were for the above announcement.

The court spoke of this right being "limited to a few persons of good moral character, with special qualifications, ascertained and certified after a long course of study," in which must be "taken an oath of office," and they are "subject to the court's discipline," and to "conditions that cannot be performed by a corporation," and "as it cannot practice law directly, it cannot indirectly. by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate."

Further, it was said, employment of the corporation would destroy privity between lawyer and client "and he would not owe even the duty of counsel to the actual litigant. * * * His master would not be the client, but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of justice, which is the highest function of an attorney and counsellor at law. * * * The degradation of the bar is an injury to the state."

What is the practice of law is well discussed in the instant case and it is to be noticed that reliance is placed for the conclusion drawn by it, not on the statute aimed at corporations, but to decided cases in which no such statute was

"According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law. An attorney at law is one who engages in any of these branches of the practice of law."

It may be that in many things there do not spring up between the patron who gives business to be attended to and the one engaging to attend to it apparently any other than a purely business relation like that of principal and agent. But statutes condemning the practice of law by corporations ought to be taken in the sense such phrase is understood to have when the disciplining of an attorney at law may be invoked. Transactions, which in their nature might call for professional skill or entail professional confidence, should be taken as forbidden. Thus, the instant case speaks of collection agencies. Many collections in their line merely involve industry and persistence, while others might call for expert legal knowledge in their proper handling. If an agency holds itself out to attend to every transaction in collection of claims, it ought to be deemed as holding itself out to practice law. If it is a corporation it cannot do this. C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS FOR 1915—WHEN AND WHERE TO BE HELD.

Alabama—Montgomery, July 9 and 10.
Arkansas—Ft. Smith, June 1 and 2.
California—San Francisco, August 23.
Florida—Atlantic Beach, July 23 and 24.
Georgia—St. Simon's Island, June 3, 4 and 5.
Illinois—Quincy, June 11 and 12.
Indiana—July 7 and 8.
Iowa—Fort Dodge, June 24 and 25.
Kentucky—Frankfort, July 8 and 9.
Maryland—Cape May, N. J., July 7, 8 and 9.
Minnesota—St. Cloud, August 5, 6 and 7.
Montana—Billings, August 13, 14 and 15.
New Jersey—Atlantic City, June 11 and 12.
North Carolina—Asheville, August 2, 3 and 4.
Ohio—Cedar Point, July 6, 7 and 8.
Oregon—Portland, August 23, 24 and 25.
Pennsylvania—Cape May, N. J., June 29, 30 and July 1.
South Dakota—Watertown, September 1, 2 and 3.

CORRESPONDENCE

PROGRAM OF MEETING OF ARKANSAS BAR ASSOCIATION.

Editor Central Law Journal:

I am in receipt of your favor of May 10th. The formal program for the Bar Association Meeting has not yet been prepared, however, the following will probably be sufficient for your purposes:

The Bar Association of Arkansas will meet in Fort Smith, June 1 and 2. Judge Jacob Trieber, president of the association, will deliver an address on "The Federal Employer's Liability Act." Hon. Peter Meldrim, president of the American Bar Association, of Savannah, Ga., will address the association. The following are the other papers on the program: S. H. Mann, Forrest City, "Recent Important Legislation." Judge Chas. D. Frierson, Jonesboro, "A Fundamental Difference in Viewpoint Between Law and Equity as Illustrated by two Maxims." Mr. H. P. Hatchett, Jonesboro, "Void Tax Sales in Arkansas." The balance of the time will be taken up with committee reports, etc. Indications are that there will be a large attendance. ROSCOE R. LYNN,

Little Rock, Ark. Secretary.

BOOK REVIEWS

REEDER ON VALIDITY OF RATE REGULATIONS.

This book by Mr. Robert P. Reeder of the Philadelphia bar, deals with the principles of constitutional law which are involved in rate regulation. This is a large subject proposed to be treated in a broad way, as the headings in its nine chapters indicate. Though the work appears to have been completed in October, 1913, we have greatly advanced in decision since then.

The commerce clause is considered, so far as it puts an implied restraint on state legislation, the distinction between local laws affecting and those regulating interstate commerce and many other distinctions recognized and treated in decision.

The text of the work is not confined to a mere forcible presentation of those large questions makes an interesting work.

The book is bound in law buckram, the typography and paper are excellent and it issues from the publishing house of T. & J. W. Johnson & Co., Philadelphia, 1914.

CLARK ON CONTRACTS, THIRD EDITION.

The third edition of Clark on Contracts is by Mr. Archibald H. Throckmorton, Professor of Law, Indiana University. It is a careful revision of both text and notes of this well-known book, the first edition of which appeared in 1894, and the second ten years later, and now at the end of the third cycle of years appears the present edition. This book in one volume is a very thorough book and the chapters follow logically from definition of contract to principles appropriate to its discharge. The text is concise, accurate and well supported by decision, and the book should be of great practical benefit to student and practitioner. It is included in the Hornbook series so popular among the publications by the house from which it emanates.

This volume is in the best style of typographical art, is bound in law buckram and is published by West Publishing Company, St. Paul, Minn., 1914.

BOOKS RECEIVED

Handbook of the Law of Contracts. By Wm. L. Clark, Jr. Author of Clark's Handbook of Criminal Law, Clark's Handbook of Corporations, etc. Third Edition, by Archibald H. Throckmorton, Professor of Law, Indiana University. Price, $3.75. St. Paul. West Pub. Co., 1914. Review in this issue.

Essentials of the Law in Two Volumes. Vol. I, Blackstone; Volume II, Elementary Law. A Review of Blackstone's Commentaries, with Explanatory Notes for the Use of Students at Law. Second Edition. By Marshall D. Ewell, LL.D. Late President and Dean of the Kent College of Law, of Chicago; author of "Ewell on Fixtures," etc. Price, $4.50. Albany, N. Y. Matthew Bender & Co., 1915. Vol. I received. Review will follow.

HUMOR OF THE LAW

A policeman whose evidence was taken on commission, deposed: "The prisoner sat upon me, calling me an ass, a precious dolt, a scarecrow, a ragamuffin, and an idiot." And, this being the conclusion of his deposition, his signature was preceded by the formal ending: "All of which I swear is true."—Law Students' Helper.

Some people might say that the Birmingham Age-Herald suggests a cruel suspicion in this colloquy:

"Professor Diggs likes to use high-sounding phrases."

"A mere affectation, no doubt."

"No. I rather think he uses such phrases because he's afraid that if people knew what he was talking about they'd know he didn't know what he was talking about."

At a trial in Macon recently a negro was on the witness stand, says the Times-Democrat. He testified that a man who had been knocked down lay on the ground five minutes, and the opposing lawyer challenged the statement. To test the accuracy of the witness he took out his own watch and asked the negro to tell him when five minutes was up. The negro told him correctly. As he was leaving the courtroom the lawyer caught up with him.

"Plum," he said, "I'll forgive you if you'll tell me how you did it."

'Yes, boss," said the negro. "Ah jus' figured it out."

"Figured it out?"

"Yes, sah, by de clock on de wall behine you."

If brevity is the soul of wit, Judge Taylor, K. C., has not many rivals among his judicial brethren. Summing up a case at Liverpool which lasted several hours, he said no more than this: "Gentlemen, you have heard both sides. It is for you to say which you believe." Often enough this is all that judicial summings up amount to, but few judges have the courage to sum up so summarily. Even this does not represent Judge Taylor's best effort in the way of saving his breath. A few years ago he de-

WEEKLY DIGEST

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Accord and Satisfaction**—Guarantor.—Where a creditor sent to a guarantor an erroneous statement of the amount due, and accepted a check made by a third person in payment, and returned the statement receipted, there was no accord and satisfaction.—Barber Asphalt Paving Co. v. Mullen, Mass., 107 N. E. 978.

2. **Adverse Possession**—Defined.—Where one does not inclose any part of the land, but merely cultivates small parts of it, different each year, and some years cultivates none, for want of water, the possession is not continuous.—Stevens v. Pedregon, Tex., 173 S. W. 210.

3.——Mistaken Boundary.—Mere possession up to a mistaken line, without claim of right or ownership beyond the true line, is not adverse possession and will not work a disseisin.—Skansi v. Novak, Wash., 146 Pac. 160.

4.——Paying Taxes.—A donee of a grantee in a deed absolute in form, yet a mortgage, who takes with knowledge, does not, by possession and payment of taxes for seven successive years, acquire any additional rights.—Hawkins v. Elston, Colo., 146 Pac. 254.

5. **Alteration of Instruments**—Condition.—Where plaintiff borrowed from W, giving notes and assignments of a life insurance policy, W's alteration of the notes, avoiding them, and his subsequent sale of them to defendant, held not to render plaintiff liable to defendant for the amount received from W as a condition of enforcing surrender of the notes and policy.—Stone v. Sargent, Mass., 107 N. E. 1014.

6.——Spoliation.—Where broker by mistake took note for less than the price, and after delivering the papers to his principal changed one figure, but was prevented from making further return voyage, but continued to follow their occupation as seamen, the steamship company was not liable for the head tax imposed on aliens by Act Feb. 20, 1907, and Immigration Rule 1, subd. 3.—United States v. International Mercantile Marine, U. S. D. C., 219 Fed. 328.

8. **Animals**—Running at Large.—Under Rev. Codes, §§ 1881, 1883, making it unlawful to permit rams to run at large during a specified season, the permitting to run at large constitutes the offense, and not alone the running at large.—Ball Ranch Co. v. Hendrickson, Mont., 146 Pac. 278.

9. **Assault and Battery**—Indictment.—On a trial for assault with a deadly weapon with intent to do great bodily harm, the character of the weapon may be inferred from the wounds or other indicia, if shown by the evidence, though the name or precise character of the instrument cannot be proved.—State v. Jukanovich, Utah, 146 Pac. 289.

10. **Assignments**—Equity.—Order on owner by building contractor after abandonment of contract and when there was nothing due him under the contract held to give the holder of the order no lien by way of equitable assignment.—National Surety Co. v. Price, Ky., 172 S. W. 1072.

11. **Attorney and Client**—Contract.—Where M, a law partner of G, who was under contract to clear title to land in consideration of B paying the costs and the owner deeding a two-thirds interest to the other two, became an attorney for the parties to the contract, he could purchase the interest of the owner subject to the contract.—Morris v. Brown, Tex., 173 S. W. 265.

12. **Bailment**—Revocation.—The delivery of a dog into defendant's possession by plaintiff with consent of his wife, the owner thereof, created at most a bailment at will, revocable without demand or notice, at the pleasure of the bailor.—Herries v. Bell, Mass., 107 N. E. 944.

13. **Bankruptcy** — Accruing Rent. — Under Bankr. Act, §§ 57d, 63a (1), a bankrupt's landlord, under Ky. St. § 2317, held entitled to a lien on the bankrupt's assets for a year's rent accruing from the date of the bankruptcy proceedings, less credits for payments in reduction of the loss.—Courtney v. Fidelity Trust Co., U. S. C. C. A., 219 Fed. 57.

14.——Contempt.—Where a bankrupt obstinately refused to comply with an order requiring him to pay over withheld assets to the trustee, it was the court's duty to order his incarceration until the order was complied with, or until further order of the court.—In re Krichevsky, U. S. D. C., 219 Fed. 347.

15.——Creditor.—Purchaser of a claim after filing bankruptcy petition to create an additional creditor, held not a "creditor" who can be counted in making up the statutory number to sustain an involuntary petition.—Emerine v. Tarault, U. S. C. C. A., 219 Fed. 68.

16.——Equity of Redemption.—A void execu-

17.——Evidence.—Reasonable cause to believe that a bankrupt was insolvent and intended a preference, used in Bankr. Act 1898, as amended by Act June 25, 1910, held not a mere suspicion, but knowledge of facts calculated to induce a belief in the mind of an ordinarily intelligent man.—Beall v. Bank of Bowden, U. S. D. C., 219 Fed. 316.

18.——Exemption.—Whether an alleged bankrupt was chiefly engaged in farming, and therefore exempt from involuntary bankruptcy adjudication, must be determined as of the time when he committeed the act of bankruptcy charged.—In re Disney, U. S. D. C., 219 Fed. 294.

19.——Injunction.—Requested modification of injunction restraining officers of bankrupt corporation and their wives from withdrawing deposits held erroneously refused for failure of petitioning creditors to deny individual ownership of deposit or to make any showing of corporation's interest therein.—In re McGinley, U. S. C. C. A., 219 Fed. 159.

20.——Lien.—The Bankruptcy Act does not avoid a lien for labor preserved and enforced by legal proceedings, where it attached more than eight months before proceedings in bankruptcy.—Tube City Min. & Mill. Co. v. Otterson, Ariz., 146 Pac. 203.

21.——Secured Creditor.—A creditor, holding bankrupt's indorsed note for part of claim, held entitled to dividend on the full claim, though indorser paid the note after proofs of claim were filed; it not being a "secured creditor," under Bankr. Act, § 1, cl. 23, and section 57h.—Young v. Gordon, U. S. C. C. A., 219 Fed. 168.

22. **Boundaries**—Construction.—A line described as running along the top of a hill down a creek, held to run with the hill only so far as it ran parallel with the creek, and not to encircle the watershed of a tributary of the stream.—Burchett v. Clark, Ky., 172 S. W. 1048.

23. **Brokers**—Fraud.—Where a vendor agreed to pay a broker a commission with knowledge that the broker was already employed by the purchaser and without the purchaser's assent, the agreement was in fraud of the rights of the purchaser.—Whitney v. Bissell, Ore., 146 Pac. 141.

24. **Carriers of Goods**—Contracts.—If the carrier has filed its schedule of rates under Interstate Commerce Act, § 6, the parties are bound by a contract made thereunder, limiting the carrier's liability; otherwise its validity depends on the value being declared for a proper lower rate.—Adams Express Co. v. Cook, Ky., 172 S. W. 1096.

25.——Pleading.—In an action for damages by rain to dry corn during transport answer alleging that the corn was shelled while too green, and was shipped in a green and unripe condition, held only a denial of the petition and to raise no new issue.—St. Louis, B. & M. Ry. Co. v. Evans, Tex., 173 S. W. 228.

27.——Defect in Cars.—A contract for the interstate transportation of live stock, which declares that the carrier is not responsible for loss from defect in cars, and that the rate is lower than at the carrier's risk, is within the Carmack Amendment and valid.—Thomas Bros. v. St. Louis & S. F. R. Co., Mo., 173 S. W. 9—.

28.——Unreasonable Delay.—In the transportation of live stock, unreasonable delays at points en route wholly unexplained raise a prima facie inference of negligence sufficient to take case to the jury.—Hunt v. St. Louis, I. M. & S. Ry. Co., Mo., 173 S. W. 61.

29. **Carriers of Passengers**—Calling Stations.—The announcement of a station in an audible voice in the coach in which a passenger is riding, so that it can be heard by those paying attention and possessed of the ordinary sense of hearing, is sufficient notice of the arrival at the station.—Missouri, K. & T. Co. of Texas v. Middleton, Tex., 172 S. W. 1114.

30.——Negligence.—Agent of defendant transfer line having ticketed plaintiff and her party, held negligent either in permitting them to enter the machine of a rival company, from which plaintiff was thrown and injured or, after seeing that they had done so, in failing to notify them of their mistake.—Denker Transfer Co. v. Pugh, Ky., 173 S. W. 139.

31.——Passenger Defined.—Where a person who boarded a car had not become a passenger, it was not negligence for the conductor to start the car before the person had an opportunity to reach a position of safety.—Wheeler v. Boston Elevated Ry. Co., Mass., 107 N. E. 938.

32.——Passenger Defined.—One riding in a caboose under agreement with the conductor, in consideration of assisting in loading and unloading freight, is a passenger.—Chesapeake & O. Ry. Co. v. Smith, Ky., 172 S. W. 1088.

33. **Commerce**—Servant.—A fireman on a switch engine, held not engaged in interstate commerce within the Employer's Liability Act, though he was hauling coal which might be used on engines used in transporting interstate commerce.—Parker v. Kansas City, M. & O. Ry. Co., Kan., 146 Pac. 358.

34. **Constitutional Law**—Eight Hour Law.—It will not be presumed that subsequent eight-hour laws were intended to apply to existing special contracts for extra work by a city employe, and thereby raise a constitutional question.—Woods v. City of Woburn, Mass., 107 N. E. 985.

35.——Motion to Quash.—One convicted under an unconstitutional statute may attack the statute by motion to quash the execution issued to collect the fine imposed.—State v. Finley, Mo., 172 S. W. 1162.

36. **Contracts**—Cancellation.—A law partner, buying the interest of an owner of land having a contract with the attorney's partner and others to deed a portion of the land upon clearing the title, held not to have the right to cancel the contract as to one, because the other refused to further prosecute the case.—Morris v. Brown, Tex., 173 S. W. 265.

37.——Implied Promise.—A statement by the owner of a building to a subcontractor that he would pay the bills and look to the contractor's sureties, held sufficient to raise an implied promise to pay the contract price.—Schade v. Muller, Ore., 146 Pac. 144.

38.——Mutuality.—A promise by mortgagee to accept payment of the mortgage before due, held not, lacking in mutuality after tender of performance by the mortgagor.—Wallace v. Workman, Mo., 173 S. W. 35.

39.——Reasonable Time.—A property owner, who procured a release of claims on it on agree-such stockholder.—Boyce v. Campbell, Wash., 146 Pac. 158.

41.——Equity Rules.—Equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv) does not require a formal request by a stockholder that the corporation sue in every case in order to entitle the stockholder to sue; the court being authorized to determine from the facts whether such a request would have been futile.—Dana v. Morgan, U. S. D. C., 219 Fed. 313.

42.——Inspection of Books.—The common-law right of inspection by a stockholder is a qualified, and not an absolute, right, and its enforcement is discretionary with the court.—Butler v. Martin Mfg. Co., Mass., 107 N. E. 999.

43.——Stock Corporation Law.—A chattel mortgage executed by a corporation without the consent of stockholders as required by Stock Corporation Law N. Y. § 6, held void and could not be ratified by subsequent action or inaction of the stockholders.—In re Post & Davis, U. S. C. C. A., 219 Fed. 171.

44. **Criminal Law**—Admissions.—Admission of sexual intimacy between accused and W held not a confession of adultery alleged to have been committed between them on a specified date, for which accused was informed against and was being tried.—State v. Sheffield, Utah, 146 Pac. 306.

45. **Damages**—Excessive.—Verdict of $2,500 for injuries to railway freight conductor, causing epileptic fits to increase in frequency and severity, weakening his mentality, impairing his sight and hearing, etc., held not excessive.—Louisville & N. R. Co. v. Winkler, Ky., 173 S. W. 151.

46. **Death**—Pleading.—A petition, in an action for death accruing in another state, is not demurrable for failure to allege that the common law was in force in that state; the Missouri law applying in the absence of such allegation.—Baker v. St. Louis & S. F. R. Co., Mo., 172 S. W. 1185.

47.——Proximate Cause.—A jury may not speculate between several causes of an accident, and find that defendant's negligence was the real cause of decedent's death, in the absence of a satisfactory foundation therefor in the testimony.—Crucible Steel Forge Co. v. Moir, U. S. C. C. A., 219 Fed. 151.

48. **Dedication**—Recorded Plat.—That a recorded plan contains no subdivision of a part of the land into lots is not decisive that that part was to remain public, but the intention of the owner as to it is to be gathered from all the circumstances.—Hobart v. Towle, Mass., 107 N. E. 954.

49. **Disorderly House**—Information.—Where the prosecution is for keeping a house of ill fame, the information need not allege the names of those charged to have indulged in illegal practices there.—City of Poplar Bluff v. Meadows, Mo., 173 S. W. 11.

50. **Domicile**—Acquirement of.—Where a lunatic was sent to a sanitarium in Maryland, he did not thereby lose his previously acquired domicile in Kentucky.—Sumrall's Committee v. Commonwealth, Ky., 172 S. W. 1057.

51. **Easements**—Abutting Owners.—A city acquiring an easement for a street may, in the absence of statute to the contrary, construct a subway in the street without becoming liable to abutting property owners required to remove appurtenances in the street.—Peabody v. City of Boston, Mass., 107 N. E. 952.

52. **Eminent Domain** — Irrigating Ditch.—Owner of land having thereon an excavation for an irrigating ditch on condemnation for a ditch held entitled to the market value of the land considered with reference to present uses for which in such condition it was available.—Scurvin Ditch Co. v. Roberts, Colo., 146 Pac. 233.

53.——Municipal Corporation.—Under Const. art. 1, § 17, where private property has been vate footpath had been granted to others, to be used for all purposes for which such passageways are commonly used, had no right to arch over its half of the path.—Institution for Savings in Newburyport v. Town of Brookline, Mass., 107 N. E. 939.

55. **Exchange of Property**—Tender of Performance.—Where performance was tendered by second party before first party withdrew a contract to exchange property, provided the second party could complete the deal, the contract was mutually binding.—Ramey v. Thorson, Kan., 146 Pac. 315.

56. **Executors and Administrators**—Distribution.—A decree for the distribution of an intestate estate should determine the exact amounts which each distributee should receive to make the entire distribution, including advancements, conform to the law.—Case v. Clark, Mass., 107 N. E. 936.

57.——Res Judicata.—The approval of the account of an administratrix held not res judicata as to loans made by her to a distributee, not reported in the account, but which she subsequently agreed to treat as advancements.—Case v. Clark, Mass., 107 N. E. 936.

58. **Explosives**—Proximate Cause.—The owner of solidified glycerine is liable for all the natural and probable consequences from any breach of his duty to exert the highest degree of care to keep it in close custody and prevent it from doing mischief.—Clark v. E. & Du Pont de Nemours Powder Co., Kan., 146 Pac. 320.

59. **Factors**—Option.—A contract between a warehouse company and a broom corn company construed, and held to bind the latter to fix prices at which the former could sell and earn a commission, and not to be an option or agency revocable at will.—Meyer-Bridges Co. v. American Warehouse Co., Kan., 146 Pac. 361.

60. **Frauds, Statute of**—Interest in Land.—A parol contract that defendant should live on land of plaintiff, build a house, pay taxes, and that after the land had become valuable it should be sold, and the profits divided, was insufficient to give defendant an interest in the land itself.—Snover v. Jones, Tex., 172 S. W. 1122.

61.——Tenant at Will.—One entering tenements under an oral agreement, void under the statute of frauds, became a tenant at will, under Rev. Laws, c. 127, § 3, and the terms of the oral agreement became binding.—Flanagan v. Welch, Mass., 107 N. E. 979.

62. **Fraudulent Conveyances**—Evidence.—The fact that a husband and wife kept no strict account of money lent by the wife to her husband is not an evidence of fraud, to invalidate a transfer of property in repayment.—English v. Brown, U. S. D. C., 219 Fed. 248.

63.——Pre-existing Debt.—A creditor may receive property for his debt if not more than reasonably sufficient to discharge it; but, where the value materially exceeds the debt, the transaction is fraudulent in law.—Coughran v. Edmondson, Tex., 172 S. W. 1106.

64. **Garnishment**—Custodia Legis.—In the absence of statutory authority, funds deposited with a state treasurer by an insurance company, in trust for the policy holders, are in custodia legis and not subject to garnishment.—Oglesby v. Durr, Tex., 173 S. W. 275.

65. **Good Will**—Contract.—A contract binding the seller to contract no house moving for the next ten years, reasonably construed, bound him merely to refrain for ten years from competing with the purchaser, and therefore was not unreasonable.—Fox v. Barbee, Kan., 146 Pac. 364.

66.——Expense to Garnishee.—Where cars in possession of a railroad, were attached in trustee process, the trustee was not to be subjected to the expense of unloading and redistribution of cars or to their collection and retention to await the result of the litigation.—Koontz v. Baltimore & O. R. Co., Mass., 107 N. E. 973.

68. **Indictment and Information**—Evidence.—That accused was informed against and had a preliminary examination for alleged adultery committed August 23, 1913, did not prevent the state at the trial from relying for a conviction on a prior separate act committed between the same parties on the 16th of the same month within the venue and jurisdiction of the court.—State v. Kimball, Utah, 146 Pac. 313.

69.——Insufficiency.—Under information charging assault with intent to murder, verdict finding accused guilty of assault with deadly weapon, as charged in the information, with no finding that it was with intent to do bodily harm, held insufficient to support a conviction, under Comp. Laws 1907, § 4195.—State v. Jukanovich, Utah, 146 Pac. 289.

70. **Injunction**—Interest in Controversy.—A telephone company has no such interest in the establishment of a second telephone company in a competitive field as authorizes it to enjoin a rival for not holding a license from the Public Utilities Commission, under Laws 1911, c. 238, § 31.—Baxter Telephone Co. v. Cherokee County Mut. Telephone Ass'n, Kan., 146 Pac. 324.

71. **Insurance**—Accident.—An accident policy, stipulating for payment for loss of a hand by removal at or above the wrist, makes insurer liable where insured's hand, by reason of an accident, was amputated, except a part which was practically worthless.—Moore v. Aetna Life Ins. Co., Ore., 146 Pac. 151.

72.—Disability.—A health policy providing for indemnity for disability from illness imposes on insurer liability for each disability from illness, though produced by the same cause.—Bolton v. Inter-Ocean Life & Casualty Co., Mo., 172 S. W. 1187.

73.——Insurable Interest.—Where the nature of a claim giving no insurable interest to a building is material to the risk on goods in such building, failure by insured to disclose the nature of his claim to the building will avoid the policy as to the goods.—Niagara Fire Ins. Co. v. Layne, Ky., 172 S. W. 1090.

74.——Liability of Agent.—Where an insurance broker undertook to keep properties insured and after expiration of the policies neglected to secure new policies for a period during which the property was destroyed by fire, he was liable for the loss.—Diamond v. Duncan, Tex., 172 S. W. 1100.

75.——Mutual Interest.—In an action for a premium on a fire policy, testimony that a third person had filed a lien on the property and had foreclosed is held competent to show the relations of the parties and their mutual interest in the property.—Lamb v. Connor, Wash., 146 Pac. 174.

76.——Proofs of Loss.—Such grounds of objection to the proof of loss as were not specifically set out by the company to the insured were waived by it as to be unavailable in defense of an action on the policy.—Niagara Fire Ins. Co. v. Layne, Ky., 172 N. W. 1090.

77.——Storing Gasoline.—Gasoline was not "stored," within the terms of an insurance policy, by the keeping of a small quantity thereof in a closed retainer for occasionally cleaning wearing apparel.—Hanover Fire Ins. Co. v. Eisman, Okla., 146 Pac. 214.

78.——Transfer of Policy.—An insurance policy is not an independent right of property that can be transferred apart from the notes it is given to secure, so that one person can hold the policy and another the notes.—Stone v. Sargent. Mass., 107 N. E. 1014.

79. **Judgment**—Res Judicata.—The defense of res judicata as to the validity of an usurious mortgage debt is not personal to the mortgagor and his privies under the judgment, but is available to his privies in the estate by purchase prior to the judgment.—De Watteville v. Sims, Okla., 146 Pac. 224.

81.——Damages.—Under oral agreement that the landlord should keep a stairway in safe condition, landlord's negligence therein entitled tenant, suffering injury therefrom, to recover, notwithstanding the landlord was not in control of it.—Flanagan v. Welch, Mass., 107 N. E. 979.

82.——Destruction by Fire.—For a fire, during a second term, the lessee is not liable, if caused by faulty construction of a cookroom, built by him during his first term, and at its end becoming the lessor's property, but only if caused by his negligent manner of use.—Bentley v. Ballard & Herring, Ky., 172 S. W. 1079.

83.——Liability.—Where the child of a lessee cut a rope holding up a dumb-waiter, and the waiter fell to the cellar, killing the child, the landlord was not liable, though the rope had been tied in an improper place.—Shea v. McEvoy, Mass., 107 N. E. 945.

84. **Licenses**—Telephone Company.—A telegraph company furnishing messengers to customers held engaged in the messenger business within an ordinance imposing an annual license fee and requiring a bond conditioned on the faithful carrying on of the business.—City of Portland v. Western Union Telegraph Co., Ore., 146 Pac. 148.

85. **Master and Servant**—Control.—Liability of master, lending or hiring his servant to work for another for some special service, for injuries to third persons, held to depend upon whether master continued in control and direction of servant as to means and result, or whether he became subject to the control of such other persons.—Tornroos v. R. H. White Co., Mass., 107 N. E. 1015.

86.——Discovery of Defects.—Where a petition did not allege how defendant could have obtained, as alleged, knowledge of the defective character of a locomotive, proof that the hydrostatic test would have disclosed such knowledge was admissible.—National Ry. of Mexico v. Ligarde, Tex., 172 S. W. 1140.

87.——Fellow Servants.—In action for injury to employe of subcontractor engaged in finishing hotel of which defendant was lessee and injured through the negligence of its elevator boy, held that the employe and the elevator boy were not fellow servants.—Gardner v. Copley-Plaza Operating Co., Mass., 107 N. E. 1000.

88.——Fellow Servant.—A ditch digger injured when rocks and earth he had thrown out rolled back into the ditch, held not entitled to recover against the master; the negligence being that of his fellow servant, the top man.—Pippin v. Will F. Plummer Const. Co., Mo., 172 S. W. 1191.

89.——Hours of Service Law.—Where a railroad operator was subject to call during meal hours, he was "on duty" during that time, within the Hours of Service Law.—United States v. Chicago & N. W. Ry. Co., U. S. D. C., 219 Fed. 342.

90.——Police Power.—The act of Arizona adopted November 3, 1914, relative to employment of citizens in preference to aliens, held not a valid exercise of the police power of the state. —Raich v. Truax, U. S. D. C., 219 Fed. 273.

91.——Rules.—Where all of defendant's employes were furnished with a book of rules, and deceased was seen to have a book in his possession similar to the book of rules, rules contained in the book were admissible.—Robichaud v. New York, N. H. & H. R. Co., Mass., 107 N. E. 975.

92.——Workmen's Compensation Act.—Negligence on the part of an injured servant and assumed risk are no bar to recovery, where master has elected not to be bound by the Workmen's Compensation Act, Ohio, § 21—1.—Crucible Steel Forge Co. v. Moir, U. S. C. C. A., 219 Fed. 151.

93. **Mines and Minerals**—Leases.—Mining leases granting an exclusive right to extract and [illegible] unlimited times are [illegible] and the royalties [illegible] thereof.—Von

to the coal thereunder, where the estate in the coal has been severed as to title.—Shrewsbury v. Pocahontas Coal & Coke Co., U. S. C. C. A., 219 Fed. 142.

95. **Mortgages**—Law of Place.—Where an owner of incumbered land in Missouri exchanged it for land in Colorado, which was conveyed by deed absolute in form to the holder of the incumbrance, the rights of the parties are governed by the laws of Colorado.—Hawkins v. Elston, Colo., 146 Pac. 254.

96.——Rents and Profits.—The law does not apply the rents and profits received by a mortgagee in possession to the payment of the mortgage, and such application depends upon an accounting on equitable principles.—Reich v. Cochran, N. Y., 107 N. E. 1029.

97. **Municipal Corporations**—Debt.—Where a municipality had power to borrow money to move a pumping plant from one place to another, it could give appropriate acknowledgments of the debt.—Forrest City v. Bank of Forrest City, Ark., 172 S. W. 1148.

98.——Proximate Cause.—Where plaintiff, on the sidewalk, was injured by a cow negligently released from a car in consequence of a wreck caused by improper switching, held that the railroad company was liable; its negligence being the proximate cause of the injury.—Hartman v. Atchison, T. & S. F. Ry. Co., Kan., 146 Pac. 335.

99.——Repair of Streets.—A public road within a town's corporate limits, though in a part of it not occupied by buildings, is a street to be repaired by it, and not by the county.—Letcher County v. Town of Whitesburg, Ky., 172 S. W. 1041.

100. **Novation**—Suit.—A creditor receiving in payment of his debt stock, and retaining it at the request of the debtor's agent, and finally returning it for non-performance of conditions, could sue on the debt.—Clarke Woodward Drug Co. v. Hot Lake Sanitarium Co., Ore., 146 Pac. 135.

101. **Parent and Child**—Negligence.—Person shot through negligence of 16 year old boy, held not entitled to recover from the boy's parents, who neither aided, abetted, nor suggested any of the acts relied upon.—Herndobler v. Rippen, Ore., 146 Pac. 140.

102. **Principal and Agent**—Ratification.—Where plaintiffs employed an attorney to secure from defendant a transfer of an oil lease, and the attorney did so, and plaintiffs, without the knowledge of the defendant, refused to accept it, except on modified terms, they cannot deny an acceptance of the transfer.—Stallings v. Carpenter, Ky., 172 S. W. 1063.

103.——Repudiation.—Where an agent fraudulently induces his principal to authorize the purchase of certain stock and procures and delivers other stock, the principal on learning the facts may offer to return the stock to the agent and recover the amount paid the agent.—Gillies v. Linscott, Kan., 146 Pac. 327.

104. **Public Lands**—Preference Right.—Under Laws 1903, p. 22, §§ 4, 5, and Rem. & Bal. Code §§ 6605, 6750, improver of tidelands held not to have lost preference right to purchase them, though application based his right on the ownership of the contiguous uplands, and his statement, claiming as an improver, was not filed within the statutory 60-day period.—Book v. West, Wash., 146 Pac. 167.

105.——Trespass.—Under Act Feb. 25, 1885, § 3, the owner of a large quantity of land, the sections alternating with sections of public land and the entire tract being uninclosed, held without right by notice to render a stockowner liable in trespass for crossing such tract with his stock.—Mackay v. Uinta Development Co., U. S. C. C. A., 219 Fed. 116.

106. **Railroads**—Estoppel.—A city employe who accepted increased wages for working ten hours under a special agreement cannot thereupon take, held to be an invitee of the railroad.—Missouri, K. & T. Ry. Co. of Texas v. Kinslow, Tex., 172 S. W. 1124.

108.——Public Policy.—An interstate railroad's possession of freight cars of another interstate railroad for use as part of its own equipment while they remained in its possession, held not to violate any rule of public policy.—Koontz v. Baltimore & O. R. Co., Mass., 107 N. E. 973.

109. **Sunday**—Completed Gift.—A gift, complete in itself and involving no element of labor, business, work, or contract, held not violative of Rev. Laws, c. 98, though made on Sunday.—Herries v. Bell, Mass., 107 N. E. 944.

110. **Taxation**—Domicile.—Where a lunatic was sane up to 1905, when he was sent by his father to a sanitarium in Maryland, his committee cannot by an election to claim him domiciled in Maryland, escape liability for taxes on his estate in Kentucky.—Sumrall's Committee v. Commonwealth, Ky., 172 S. W. 1057.

111. **Trade Marks and Trade Names**—Infringement.—Sale of substance similar to that manufactured by complainant under the tradename "Listerseptine" held an infringement of complainant's registered trade-mark "Listerine."—Lambert Pharmacal Co. v. Kalish Pharmacy, U. S. D. C., 219 Fed. 323.

112.——Unfair Competition.—"Listogen" held not descriptive by suggestion so as to be properly applied to a compound similar to that sold under the name "Listerine."—Lambert Pharmacal Co. v. Bolton Chemical Corporation, U. S. D. C., 219 Fed. 325.

113. **Trover and Conversion**—Enticement.—Where plaintiff, with consent of his wife, had possession of her dog, and defendant enticed the dog away and detained it under a claim of ownership, plaintiff could sue for conversion.—Herries v. Bell, Mass., 107 N. E. 944.

114. **Vendor and Purchaser**—Rescission.—One induced to buy fruit orchard by false representation as to the returns therefrom, held put upon inquiry as to the falsity of the representations, and not entitled to rescind when he offered to rescind the third year after the purchase.—Whitney v. Bissell, Ore., 146 Pac. 141.

115. **Waters and Water Courses**—Appropriation.—As between appropriators of water for direct irrigation only, the prior appropriator may not divert, to storage, water, which it could use for direct irrigation, but cannot because of the physical condition of its ditch, so use.—Greeley & Loveland Irr. Co. v. Farmers' Pawnee Ditch Co., Colo., 146 Pac. 247.

116.——Definition.—A "water course" is a stream having beds and banks and a periodical flow, though the waters need not at all times flow between the banks, for, even if it spread out over land so as to make it swampy, yet, if it kept on in a general course over plaintiff's land, defendant could not legally obstruct its escape.—Miller v. Eastern Ry. & Lumber Co., Wash., 146 Pac. 171.

117.——Right of Contract.—A city having no legislative power under Const. Art. 11, § 19, to require payment of a gross earnings tax as a condition to a water franchise, such tax could not be supported under the city's general power to contract.—Town of St. Helena v. Ewer, Cal., 146 Pac. 191.

118. **Wills**—Construction.—A will construed and held to vest the feel of land in testator's son at testator's death, with a postponement of enjoyment until the termination of a life estate, and to charge the fee, as to the son or his successors in interest, with payment of certain legacies.—Mastellar v. Atkinson, Kan., 146 Pac. 367.

119.——Incapacity.—Where a codicil was contested on ground of incapacity, evidence of a parol agreement made about 15 years before, that the testator would will the property to contestants, has no relevancy to the issues.—Gernert v. Straeffer's Ex'r, Ky., 172 S. W. 1044.

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TAXATION ON THE ENTIRE CAPITAL OF A FOREIGN CORPORATION SHIPPING GOODS IN INTERSTATE COMMERCE.

The Supreme Court of Tennessee applies the distinction noted in Baltic Mining Co. v. Massachusetts, 231 U. S. 78, 34 Sup. Ct. 554, 77 Cent. L. J. 455, between a state taxing the entire capital stock of a railroad or a telegraph company and that of a private foreign corporation for gain, as a privilege tax upon its right to carry on business in a state. Atlas Powder Co. v. Goodloe, 175 S. W. 547.

The basic reason of the distinction, as we gather it, is that the business of the railroad or the telegraph company, as shown in what are known as the Kansas cases (216 U. S. 1; ibid 56) is of public agencies in interstate commerce, while a private corporation may produce articles, or deal in articles, merely intended for interstate commerce.

It must be true, of course, that a state has complete jurisdiction to tax a domestic corporation without regard to what it intends to do with its products or property. If this can be ignored as to such a corporation, it also may be ignored as to a corporation that comes into the same field with it, though under charter of another state.

The Baltic Mining Co. case expresses itself on this line of distinction as follows:

"An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary chartered is not of itself commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce, and are entitled to the protection of the federal Constitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a state to tax it by burdens and laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the state has imposed the tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved." Baltic Mining Company v. Mass., 231 U. S. 78-86, 34 Sup. Ct. 19, 58 L. Ed. 127.

In the Atlas Powder Co. case there was a tax imposed on the authorized capital stock. The Tennessee Court said of the Baltic case and White Dental Company, decided on same theory, that they: "Are engaged to a large extent in interstate commerce, but they are each primarily manufacturing corporations and engaged in selling their own products upon the market. In these two federal cases neither company owned a factory in Massachusetts, but each had local storehouses where local sales were made. They could have omitted the local business if they saw proper and thus separated the local business from the interstate commerce. This was entirely optionary, as it is in the case at bar. A short distinction exists in the Pullman Company and the

We suppose also it is allowable to say that it would be optionary for a foreign corporation to confine the sale of its manufactured product, or all of its activities, to the market of the state to which it has moved and has been allowed to establish itself. And, then, if it did not like the privilege tax, it could become a domestic corporation.

NOTES OF IMPORTANT DECISIONS

BIGAMY—INDICTMENT CHARGING UNLAWFUL CEREMONY IN ANOTHER STATE FOLLOWED BY COHABITATION IN INDICTING STATE.—It appears from McBride v. Graeber, 85 S. E. 86, decided by Georgia Court of Appeals, that habeas corpus was sued out against the warden of a chain gang for discharge of petitioner from punishment under sentence upon a judgment on a plea of guilty to an alleged void indictment for bigamy.

The indictment found in Georgia charges petitioner with "the offense of bigamy * * * in the county aforesaid, having been legally married to Marie E. O'Connell, she being still and then alive, did marry Bettie Lou Weaver * * * in the State of Florida and County of Duval * * * and knowing that his lawful wife * * * was still living, did cohabit and live as man and wife with said Bettie Lou Weaver in said County of Wayne (State of Georgia)," etc.

The court of appeals in sustaining the judgment of the lower court, discharging the petitioner said, that: "In some jurisdictions cohabiting with a bigamous wife is placed by statute on the same plane as the act of going through a bigamous ceremony of marriage, but no such statute exists in Georgia. It is true that by the common law and the law of this state, a mutual agreement to be husband and wife, made by parties able to contract and followed by cohabitation is recognized as a valid marriage."

It seems to us that there was charged in this indictment an agreement to live together as man and wife and a following of such agreement and when followed by cohabitation it amounts to a common law marriage, which offers sufficient basis for a prosecution for bigamy. If this reasoning is true, there need be no statute in the indicting state such as is spoken of, and states that have such may have it out of abundance of caution.

There seems no difficulty to our mind about venue of an offense initiated in one state and completed in another. We understand the rule to be that the offense is committed in the latter state.

Why should not the ruling we contend for be enforced? The essence of the offense of bigamy is in the unlawful ceremony, considered as an agreement, and followed by cohabitation. If ceremony is good enough in the state where it is performed to constitute bigamy, it ought to be at least equivalent in the state, where it is followed by cohabitation, to an agreement to be husband and wife. To allow one offending in a course of adultery, to escape indictment for the higher offense of bigamy, is to give him benefit from his own infamy.

We do not understand, that the rule that a valid common law marriage cannot arise out of a meretricious relation interferes with making a common law marriage meretriciously begun the basis of an indictment for bigamy.

CARRIERS OF GOODS—RIGHT OF CONSIGNEE TO INSPECT C. O. D. GOODS.—The Supreme Court of Mississippi reverses trial court in its holding, that there was conversion by carrier where it allowed inspection of a C. O. D. shipment and consequent rejection by the consignee. Southern Express Co. v. Grace, 68 So. 172.

In this case there was a shipment of four dresses and injunction was placed on the carrier not to deliver "unless $58 was paid to the express company before delivery." The company allowed the consignee to take the goods out of the office for the purpose of examining them before paying the charges. The consignee accepted one of the dresses valued at $11, and redelivered the others to the company to be returned to consignor. She refused to accept them or the $11 and brought suit for the $58.

The plaintiff relied on Hutchinson on Car-

316; Avery v. Stewart, 2 Conn. 74, 7 Am. Dec. 240; Herrick v. Gallagher, 60 Barb. 566; Isherwood v. Whitmore, 11 M. & W. 347. Compare Wiltse v. Barnes, 46 Iowa 210.

In this case the plaintiff appeared to think she had given specific directions not to allow inspection, but the terms thereof do not appear certain as against observance of the usual rule. We doubt, however, the right of the carrier to split the acceptance as it did.

THE ANGLO-FRENCH DECLARATION.*

No measures of the belligerents during the present war have so profoundly affected the interests of neutral states as those contained in the German Declaration of February 4 and in the British and French Declaration of March 1. The German Declaration is, however, of a political and military nature, while the Anglo-French Declaration, besides bearing the stamp of a politico-military act, is, in the form that it assumes in the English Order in Council of March 11, 1915,[1] and the French Decree of March 13, 1915,[2] avowedly a legal measure, whose interpretation and application is left to the Prize Courts of the countries involved.

The first public declaration of the new policy of the British and French governments was made by Premier Asquith in the House of Commons on March 1.[3] After a statement of the aims as well as the illegality of the German Declaration of February 4, he said:

"Germany is adopting these methods against peaceful traders and non-combatant crews with the avowed object of preventing commodities of all kinds, including food for the civil population, from reaching or leaving the British Isles and Northern France.

"Her opponents are therefore driven to frame retaliatory measures in order, in their turn, to prevent commodities of any kind from reaching or leaving the German Empire. These measures will, however, be enforced by the British and French governments, without risk to neutral ships or to neutral or non-combatants' lives, and with strict observance of the dictates of humanity. The British and French governments will therefore hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership or origin. It is not intended to confiscate such vessels or cargoes unless they would be otherwise liable to confiscation. Vessels with cargoes which have sailed before this date will not be affected."

On the same date a diplomatic note was transmitted by Great Britain and France to the neutral powers. This note contains the substance of the Declaration, and is reprinted in the margin.[4]

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*This very interesting and timely article by Dr. Charles H. Huberich, was written before any formal protests of neutrals were declared. Dr. Huberich was formerly professor of law at Leland Stanford University, and is now engaged in the practice of international law in Europe, having offices in Berlin and Paris. The article is written from a purely judicial point of view

(4) L'Allemagne a déclaré que la Manche (English Channel) les côtes nord et ouest de la France, ainsi que les eaux entourant les iles britannique, sont une "zone de guerre" et elle a officiellement notifié que "tous lesnavires ennemis rencontrés dans cette zone seront détruits et que les navires neutres pourront y être en danger." C'est là en réalité une pretention de torpiller à vue, sans égard pour la sécurité des équipages et des passagers, Aout navire marchand sous tout pavillon. Comme il n'est pas au pouvoir de l'amirauté allemande de maintenir aucun bâtiment de surface dans ces eaux, cette attaque ne peut être pratiquée que par des moyens sous-marins. Le droit des gens et la coutume des nations, en ce qui concerne les attaques contre le commerce, ont toujours présumé que le premier devoir du capteur d'un navire marchand est de l'amener devant une cour de prises, où il puisse être jugé, où la régularité de la capture puisse être appréciée, et où les neutres puissent recouvrer leur cargaison. Couler une prise est en soimême un acte contestable, auquel on peut avoir recours seulement dans des circonstances extraordina[illegible] que des dispositions ont [illegible] de tout l'

It was expressly stated, by Mr. Asquith that the Declaration involves an application neither of the rules relating to blockade, nor of those relating to contraband. The Declaration creates new legal situations in the law of prize, and especially affects the application of the Declaration of Paris of 1856, and more particularly Articles 2 and 4, relating to enemy goods on neutral ships and the effectivity of blockades.[5] It also affects the Declaration of London of 1909, which, though unratified, has been adopted for the period of the war by Great Britain and France, subject to certain modifications. The Declaration of March 1, subjects enemy goods on board neutral ships to seizure and detention during the war, but not to condemnation. The legal position of such goods is therefore less favorable than that accorded under the Declaration of Paris. But they are not subject to condemnation, and therefore their legal position is more favorable than that accorded under the older doctrine of the law of prize.

The purpose of the Anglo-French Declaration is the complete inhibition of goods traffic, but not passenger traffic. It bears analogies to a blockade, but while under Article 17 of the Declaration of London, neutral vessels may not be captured for breach of blockade except within the area of operations of the war ships detailed to render the blockade effective, the Declaration of March 1, extends the area of operation to all of the high seas. It differs from the old so-called "paper blockade" in that the cargo seized is subject to detention and not to condemnation, and that the vessel is freed after discharging the prohibited cargo.

It is to be noted that while the Declaration of Paris was signed by Great Britain, it was never ratified by that country.[6] But it has received judicial recognition in several decisions during the present war.[7] It must also be mentioned that the United States, while it has always stood for the

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les papiers avant de le couler ou même de le capturer. De même, le devoir d'humanité consistant à assurer la sécurité des équipages des navires marchands, qu 'ils soient neutres ou ennemis, est une obligation pour tout belligérant. C'est sur cette base que toutes les discussions antérieures sur le droit tendant à réglementer la conduite de la guerre sur mer ont procédé.

Aussi bien, un sous-marin allemand est incapable de remplir aucune de ces obligations. Il n'exerce aucun pouvoir local sur les eaux dans lesquelles il opère. Il ne conduit pas ses captures dans le ressort d'une cour des prises. Il ne porte aucun équipage de prise qu'il puisse mettre à bord d'une prise. Il n'emploie aucun moyen efficase de distinguer entre un navire neutre et un navire ennemi. Il ne reçoit pas à son bord, pour en assurer la sécurité, l'équipage et les passagers du navire qu 'il coule. Ses méthodes de guerre sont, en conséquence, entièrement en dehors de l'observation de tous les textes internationaux réglementant les opérations contre le commerce en temps de guerre. La déclaration allemande substitute à la capture réglementée la destruction aveugle.

L'Allemagne adopte ces méthodes contre des commerçants pacifiques et des équipages non-combattants dans le but avoué d'empêcher des marchandises de toute nature (y compris les provisions pour l'alimentation de la population civile) de pénétrer dans les Iles Britanniques et la France septentrionale, ou d'en sortir. Ses adversaires sont, en conséquence, contraints de re courir à des mesures de représailles en vue d'empêcher par réciprocité les marchandises de toute natûre de pénétrer en Allemagne ou d'en sortir. Toutefois, ces mesures seront exécutées par les gouvernements français et brittannique sans risques, ni pour les navires, ni pour la vie des neutres et des non-combattants, et en stricte conformité avec les principes d'humanité.

En consequence, le Gouvernement français et le Gouvernement britannique se considèrent comme libres d'arrêter et de conduire dans leurs ports les navires portant des marchandises présumées de destination, propriété ou provenance enemies. Ces navires et ces cargaisons ne seront pas confisqués, à moins pu 'ils ne soient

2. The neutral flag covers enemy's goods, with the exception of contraband of war.

4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

(6) Lord Tiverton points out that the Declaration of Paris has not even the weight of a treaty, as it was never ratified, and that the Naval Prize Act, 1864, so far from recognizing it,

principles announced in Articles 2-4 of the Declaration of Paris, and declared the principles applicable during the Spanish-American War, it has never formally adhered to the declaration. Upon this point, Castle[8] says:

> "In the case of the United States, or any other nation who is not a party of the declaration, it is doubtful whether they could claim the benefit of this declaration, when they were neutral, not being parties to the Declaration of Paris. The question, if it arose, would be probably settled as a question of diplomatic policy rather than of legal interpretation of the words of the declaration.
>
> "If it is considered that the protection of the neutral flag is not only a privilege granted to the neutral ship, but also to the belligerent, then where such belligerent has acceded to the declaration it clearly has a right to claim that its goods shall be free under the flag of a neutral nation, though that nation should be the United States, or any other nation not a party to the declaration. The fact that the declaration abolishes privateering shows that its spirit is in favor of ameliorating the rigor of war, not only with regard to the commerce of neutrals, but that of the belligerents themselves. If, however, it should be held, that the protection of the neutral flag is one granted the neutral nation only, to protect its commerce from annoyance and loss, then it is difficult to understand with what justice a neutral nation can claim the privileges granted by a declaration to which it is no party. *Qui sentit commodum sentire debet et onus.*"

Against this view it may perhaps be asserted that the principles announced in these articles have become a part of general international law outside of the Declaration of Paris.[9]

There are essential points of difference in the Declaration of March 1, as the same is formulated in the English Order in Council and in the French Decree. The English Order is far more sweeping in the character of its provisions than is the French Decree. The former applies to vessels as well as to cargo, it is operative as of March 1, 1915, and applies to all of the countries at war with Great Britain, while the latter applies only to cargo, is operative only from the date of promulgation (March 16, 1915), and applies only to the German Empire.

Articles 1 and 3 of the English Order refer to merchant vessels which sailed from their port of departure after March 1, 1915, while Article 4 refers to merchant vessels which sailed from a port after the date named. The language of Article 4 is broad enough to cover sailings from an intermediate port (even a port of distress) after such date. The French Decree (Art. 1) refers generally to ships which sailed (ayant pris la mer) after March 16, 1915.

Both enactments leave the liability of the vessel or goods to capture or condemnation under other provisions of law unaffected.[10] The court may award damages for detention.[11]

The provisions of the two enactments may be considered under the following four heads: limitations on shipping, enemy property, goods of enemy origin, and goods of enemy destination.

Limitations on Shipping.—Article 1 of the English Order provides:

> "No merchant vessel which sailed from her port of departure after the 1st of March, 1915, shall be allowed to proceed on her voyage to any German port.
>
> "Unless the vessel receives a pass enabling her to proceed to some neutral or allied port to be named in the pass, goods on board any such vessel must be discharged in a British port and placed in the custody of the Marshal of the Prize Court. Goods so discharged, not being contraband of war,

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[8] Law of Commerce in Time of War, p. 58.

[10] Order in Council, art. 7; Decree, art. 6.

[11] The Mixed Commission acting under the Treaty of November 19, 1794, between Great Britain and the United States, awarded to American

shall, if not requisitioned for the use of His Majesty, be restored by order of the court, upon such terms as the court may in the circumstances deem to be just, to the person entitled thereto."

The language of this article must be compared with that of Article 3 which prohibits merchant vessels from carrying goods with an enemy destination, or which are enemy property, to a port other than a German port. Article 1 is general in its terms, and prohibits merchant vessels from going into German ports, with or without cargo. It is, however, as to ships without cargo a *lex imperfecta,* in that the Order provides no penalty.

A further question arises as to the meaning of the term, "merchant vessel." Does the term include a private yacht? At the International Naval Conference of 1909, the question whether the words "navires de commerce" as used in the Declaration of London included private yachts was discussed, and it was asserted by the American delegate, Mr. Wilson, that according to the American view, such vessels were included. M. Renault and other members stated that this was also the view of the Conference.

During the present war, the German yachts *Stella Maris*[12] and *Lasca II*[13] which were in British ports at the outbreak of the war were ordered to be detained pending further orders of the court. In the case of the steam yacht *Oriental,*[14] a Hungarian vessel, which at the outbreak of the war was at Southampton where she had been sent in order to take part in the Cowes regatta, Sir Samuel Evans said that a yacht was not a merchant vessel within the meaning of the Sixth Hague Convention, relative to the status of enemy merchant ships at the outbreak of hostilities. He continued:

"The preliminary article of the Sixth

of merchant ships. Nevertheless, this country was willing, as a favor, to give the yacht these days of grace. For some reason she was not able to avail herself of them. In the circumstances, I hold that the vessel was properly seized as good and lawful prize, and as such I order her condemnation and sale."[15]

It would seem that Belgian ports, e. g., Antwerp, Zeebrugge, in the military occupation of the German forces come under the head of German ports within the meaning of the Order in Council. This is expressly provided for in the French Decree, which states (Art. 1): Le territoire occupé par les forces armées allemandes est assimilé au territoire allemand.

The other limitations imposed upon shipping arise indirectly under the provisions relating to the carrying of goods of enemy origin or destination, or which are enemy property, and are discussed below.

Enemy Property.—In the case of vessels bound to or from a German port, no question as to the enemy character of the cargo arises. Any goods on board such vessels, regardless of their ultimate destination, are

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(15) It is difficult to understand this decision. The Order in Council of August 4, 1914, (London Gazette, August 4, 1914, First Supplement), prohibiting enemy merchant ships from leaving British ports, was by the Order in Council of August 12, 1914 (London Gazette, August 11, 1914, First Supplement), extended so as to include Austrian and Hungarian vessels. The necessary reciprocity having been secured, the Secretary of State for Foreign Affairs in the Notification of August 15, 1914 (London Gazette, August 14, 1914, Second Supplement), accorded certain days of grace to Austro-Hungarian "merchant ships." If the Oriental was given these days of grace "as a favour," she was given them as a "merchant ship" under the Notification. If she received a pass, and did not avail herself thereof, she might be condemned (The Achaia, H. B. M. Supreme Court in Egypt, February 6, 1915). But if owing to circumstances beyond its control, a merchant ship is unable to leave the enemy port within the days of grace, the belligerent may merely detain it on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation, but the vessel may

subject to detention. The provisions of Article 1, having reference to vessels bound to a German port have been discussed *supra*. The provisions of Article 2 are discussed *infra sub* enemy origin.

Articles 3 and 4 of the English Order relate to voyages to or from ports other than German ports, and read as follows:

"3. Every merchant vessel which sailed from her port of departure after the 1st of March, 1915, on her way to a port other than a German port, carrying goods with an enemy destination, or which are enemy property, may be required to discharge such goods in a British or allied port. Any goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, unless they are contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the court, upon such terms as the court may in the circumstances deem to be just, to the person entitled thereto.

"Provided that this article shall not apply in any case falling within Articles 2 or 4 of this Order.

"4. Every merchant vessel which sailed from a port other than a German port after the 1st of March, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into court and dealt with in such manner as the court may in the circumstances deem to be just.

"Provided that no proceeds of the sale of such goods shall be paid out of court until the conclusion of peace except on the application of the proper Officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this Order.

"Provided also that nothing herein shall sujets de l'empire d'Allemagne . . . seront arrêtées par des croiseurs de la République.

The English Order in Council is aimed at the sea-carriage of enemy-owned goods, the French Decree at German-owned goods. The enactments do not state how enemy character is to be determined, and it must be assumed that the same rule regarding this point apply as in other cases.

Both Great Britain and France have adopted the Declaration of London as the basis of their prize law, but the Declaration merely provides (Art. 58) that:

"The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner."

Regarding this article the General Report of the Drafting Committee says that "it is the neutral or enemy character of the owner which determines the character of the goods, but what is to determine the neutral or enemy character of the owner? On this point nothing is said, because it was found impossible to arrive at an agreement. Opinions were divided between domicil and nationality."

Resort must therefore be had to the general principles of prize law in force in the two countries. In France nationality is the sole test, and therefore, to take extreme cases, under the French Decree, the goods of a German subject domiciled in France are subject to the provisions of the Decree, while the goods of an Austrian subject domiciled in Germany fall without its scope.

Under the English Order the goods are enemy property if they belong to a person domiciled or having a "house of trade" in enemy territory. Baty and Morgan in their recent work,[16] conclude that the enemy

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(16) War: Its Conduct and Legal Results, pp. 306, et seq. They explain the cases of the Postillion (Hay & Marriott. 245), and the Liesbet von

character or cargo is shown if the owner is either a subject of the enemy state, or is domiciled or has a house of trade in the enemy country. In the latter case the enemy character attaches only to property belonging to the particular house of trade. The prevailing view, however, is that enemy character attaches only by virtue of domicil or, as regards property belonging to a particular house of trade, the possession of a house of trade in the enemy country, regardless of the nationality of the owner.

Under the English Order therefore the property of British or neutral subjects domiciled in Germany, Austria-Hungary or Turkey is impressed with an enemy character, as is also the property of a house of trade in these countries owned by persons domiciled in non-enemy states. The property of a house of trade in a non-enemy country, where such house of trade is owned by a person domiciled in an enemy country is enemy property, the enemy domicil of the owner tainting his foreign venture.[17]

The legal position of a cargo may therefore be essentially different according as the case is tried before a British or a French Prize Court.

Enemy Origin.—Article 2 of the English Order provides as follows:

> "No merchant vessel which sailed from any German port after the 1st of March, 1915, shall be allowed to proceed on her voyage with any goods on board laden at such port.
>
> "All goods laden at such port must be discharged in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into court and dealt with in such manner as the court may in the circumstances deem to be just.
>
> "Provided that no proceeds of the sale of such goods shall be paid out of court until the conclusion of peace, except on the application of the proper Officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this order.
>
> "Provided also that nothing herein shall prevent the release of neutral property laden at such enemy port on the application of the proper Officer of the Crown."

The provisions of Articles 3 and 4 have been given *supra* in the discussion of Enemy Property. The words "enemy origin" are not defined in the Order. The doctrine harks back to the cases holding that the produce of the enemy's territory is considered as hostile, so long as it belongs to the owner of the soil, whatever may be his national character or personal domicil. Regarding this doctrine, Lord Stowell said:[18]

> "Certainly nothing can be more decided and fixed, as the principle of this court, and of the supreme court, upon very solemn argument there than that the possession of the soil does impress upon the owner the character of the country, so far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be."

This doctrine was applied in the case of the *Vrow Anna Catharina,*[19] where Lord Stowell said:

> "It cannot be doubted that there are transactions so radically and fundamentally national as to impress the national character independent of peace or war, and the local residence of the party. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the

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nounced in the American decision in the S. José tion independent of his own personal residence and occupation."

The views of Lord Stowell are adopted by Chief Justice Marshall in the case of Thirty Hogsheads of Sugar v. Boyle.[20] These cases were decided when the products of the soil were the chief articles of export. The Declaration of March 1, extends this doctrine, and assimilates the products of the factory to the products of the soil. But it goes further and makes it apply to the non-resident neutral purchaser of these products.

The French Decree applies to all goods of German origin (Art. 1), and defines "enemy origin" in Article 2 as follows:

> Seront considerés comme marchandises venant d'Allemagne tous articles et marchandises de marque ou de fabrication allemandes ou fabriqués en Allemagne, les produits du sol allemand, ainsi que tous les articles et marchandises de quelque nature que ce soit, dont le lieu d'expédition, directe out par voie de transit, est en territoire allemand.
>
> Toutefois, la présente disposition ne s'appliquera pas aux articles ou marchandises qu'un national, d'un pays neutre justifiera avoir fait entrer de bonne foi en pays neutre avant la promulgation du présent décret, ou dont il justifiera avoir la propriété régulière et de bonne foi antérieurement à ladite promulgation."

The prohibition under Article 2 of the English Order is directed against merchant vessels sailing from German ports. It is immaterial whether the cargo is of enemy origin or is enemy property. It applies to goods coming from a neutral country and transshipped at a German port. Article 4 applies to all non-German ports, including other enemy ports, e. g., Trieste, Constantinople, but is confined to cases where the goods are of enemy origin or are enemy property. It does not prevent the taking of cargo of neutral origin and ownership, transshipped at Austrian or Turkish ports.

Under this head, too, differences in the goods manufactured in Austria, out of Austrian material, and owned by a neutral are, if shipped from a German port subject to detention under both enactments, while if the same goods are shipped from an Austrian port they are subject to detention under the English Order in Council, but not under the French Decree.

Both enactments clearly include shipments of goods of prohibited origin from a neutral port.

Enemy Destination.—Article 1 of the English Order, already discussed, prohibits all shipments of goods to German ports, regardless of their ultimate destination. Article 3 prohibits the carrying of any goods to a port other than a German port where the goods have an enemy destination. It does not prohibit shipments to non-German enemy ports where the ultimate destination is not an enemy one, e. g., goods may be shipped to Trieste, but not to Bremen, where the goods are destined to Switzerland.

The French Decree explain enemy destination in Article 3:

> "Seront considérés comme merchandises expédiées sur l'Allemagne, tous articles et marchandises, de quelque nature que ce soit, expédiés directement ou par voie de transit sur l'Allemagne ou sur un pays voisin de l'Allemagne, lorsque les documents qui accompagnent lesdits articles ou marchandises no fournissent pas la preuve d'une destination finale et sincère en pays neutre."

Shipments to neutral ports are clearly within the scope of the enactments, if the ultimate destination is an enemy one, regardless of the fact whether the transit from such neutral port is to be by sea or by land. We have here an adoption of the doctrine of continuous voyages in the extreme form in which it was applied by the American courts in the cases of the *Peterhoff*[21] and the *Springbok*[22] (sea-transit) and by the Italian court in the case of the *Doelwyk*[23] (land-transit), and asserted by the British government during the Boer War in connection with the shipment of contraband to Lorenzo Marquez.[24]

To illustrate: goods shipped from Rio Janeiro to New York, to be shipped from there to Rotterdam, either by the same or by another vessel, and thence by rail to Hamburg, are subject to the provisions of the declarations from the moment they leave Rio Janeiro.

Under the English order a merchant vessel which has cleared for a neutral port from a British or allied port, or which has been allowed to pass having an ostensible destination to a neutral port and proceeds to an enemy port, is liable to condemnation if captured on any subsequent voyage. (Art. 6). This is an application and extension of the provisions of the Order in Council of October 29, 1914.[25] In this Order it was provided that neutral vessels carrying contraband and in the possession of papers indicating a neutral destination which notwithstanding the destination shown on the papers proceed to an enemy port are liable to capture and condemnation if encountered before the end of the next voyage. The Order in Council of October 29, 1914, was in turn an extension of the doctrine set forth in the Order in Council of August 20, 1914,[26] which subjected such ships to condemnation only if encountered before the completion of the return voyage. The Declaration of London exempts vessels from capture for the carrying of contraband on a previous occasion if such carriage is in point of fact at an end. (Art. 38).

Both enactments contain provisions for the exemption of particular voyages or cargoes from the operation of the laws. Article 8 of the English Order also contains the following provision:

> "Nothing in this Order shall prevent the relaxation of the provisions of this Order in respect of the merchant vessels of any country which declares that no commerce intended for or originating in Germany or belonging to German subjects shall enjoy the protection of its flag."

There is no similar provision in respect of Austria and Turkey.

It remains to be seen how neutral states will regard these new restrictions on their commerce and shipping, and with what rigor the provisions will be enforced. That the interests of neutrals must suffer severely as the result of this new measure was frankly admitted by Premier Asquith. That its provisions cannot be reconciled with the "juridical niceties" of the law of blockade and contraband is beyond question. The Anglo-French Declaration is but another illustration that when the highest interests of nations are at stake long-established principles of international law must yield, unless the fear of effective retaliation by the enemy or the fear of alienating powerful neutral states serves to deter.

CHARLES HENRY HUBERICH.

Berlin-Paris.

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[24] The German ships, Herzog, General and Bundesrat were seized, but the matter was settled through diplomatic channels. At the time Professor Holland was of opinion that the English courts would probably not follow the deci-

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MASTER AND SERVANT—JOINT MASTERS.

TERRY et al. v. BURFORD.

Supreme Court of Tennessee. April 17, 1915.

175 S. W. 538.

Where 60 property owners contracted with a special police officer to pay him $1 each per month, he to be under control of all of them and to report nightly for instructions from any of the subscribers at a certain place, the contract of hiring was joint, and not several, giving rise to a joint liability on the part of the subscribers for tortious acts committed by such officer within the scope of his authority and employment.

(Editor's Statement.—In this case 60 property there. Suit was brought by administratrix of deceased against the policeman and the subscribers.)

The Court of Civil Appeals held that the peremptory instruction should have been given in behalf of the subscribers on both points.

(1) 1. Was the contract joint or several? In our opinion it was joint. It was signed by all the parties. It bound Terry to guard the property of all, during the whole of each night. It specified when his vigil should begin and when it should end. It required that he should make "rounds" of the territory, and that the "rounds" should continue throughout the night, with the exception only that they should be broken by reports each hour at "headquarters" (subsequently fixed at Broad street engine house), "for calls or instructions from the subscribers hereto." When he was on his "rounds" he was in the service of all the subscribers, as much so on the streets of the neighborhood as when on the premises of any of his subscribers. The fact being publicly known that he was so traversing the neighborhood, watching and guarding, could not fail to deter the marauders who had previously invaded the neighborhood, and to largely prevent, if not wholly, similar outrages. It could not fail to give to the neighborhood a feeling of security, displacing the uneasiness previously experienced through the sense of insufficient police protection, on the occurrence of frequent burglaries. Nor can it be justly said that Terry's entry upon the premises of any one of the subscribers was a service to that person only. Such service, when required for protection or watching, was within the sense and meaning of the contract, and hence exacted by all; moreover, faithfulness in this regard to each subscriber could not fail to redound to the security of all, as a warning to evildoers, that the protector of the property, and of the homes of the subscribers, was vigilant and active. So we have here, contracted for, a service to all, required by all; in addition, an agreement to report hourly at "headquarters" for "calls or instructions from the subscribers," thus providing for an hourly control. It matters not that Terry says he reported to headquarters for "information" only; whether that "information" might be as to the wishes or instructions of his employers, or what not, the essential fact was the joint servant of all, that each subscriber contracted to pay only $1 per month each on the compensation. The payment of compensation, or the contrary, is not by any means a controlling fact (1 Labatt, Master and Servant, § 19; Gaines v. Bard, 57 Ark. 615, 22 S. W. 570, 38 Am. St. Rep. 266; Haluptzok v. Great Northern R. Co., 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739; Pugmire v. Oregon Short Line R. Co., 33 Utah, 27, 92 Pac. 762, 13 L. R. A. (N. S.) 565, 126 Am. St. Rep. 805, 14 Ann. Cas. 384), although it is a relevant fact, and has more or less weight in determining the question as to "whose servant was he," when there are other facts bearing on the point (Burke v. Norwich & W. R. Co., 34 Conn. 474; Corning v. Walker, 100 N. Y. 547, 3 N. E. 290); but it is merely corroborative, and indeed practically useless, where it is otherwise shown that the right existed to control the person whose status is in question, the right of control itself being sufficient to prove the relation of master and servant (1 Labatt, M. & S. § 23). In determining whose servant Terry was, the chief inquiry then is: Under whose orders was he? This is answered by the contract in the manner above shown, that he was subject to and under the orders of all of the subscribers by the very terms of the contract. This conclusion, if not strengtnened, for it needs no strengthening, is illustrated by the fact that he was doing service for all. .

This latter circumstance is at times important, when the power to control is not otherwise made apparent, or is confused by services rapidly shifting from one person to another, as in the case of guards at railroad crossings, where numerous tracks are laid, and these tracks are used by more than one company, but all served by the same guard. Of a similar situation the Supreme Court of Iowa said, in Buchanan v. Chicago, M. & St. P. R. Co.:

"The idea that the employee was under the employment of one company for five minutes, and then another for a few minutes and another for a short time, and that he changed his employers with the facility with which the kaleidoscope exhibits an array of colors, involves an absurdity." 75 Iowa, 393, 39 N. W. 663.

And in Gulf, C. & S. F. R. Co. v. Dorsey, 66 Tex. 148, 18 S. W. 444,—wherein it appeared self of the duty by a contract that the other should put and keep in proper condition the track where plaintiff was injured, no such contract was proved. Under the evidence, the track was the track of appellant as well as the track of the other defendant. It was defective, and at least partly caused the plaintiff's injury. But if the track was safe, and the injury was caused solely by defects in the cars of the other defendant, then * * * both defendants were liable. * * * The appellant is the last of the three masters that could escape liability. It hired the plaintiff; its yardmaster directed his labors. Betwixt it and him the relation of master and servant was created by express contract. That relation between him and the other companies arises by inference from the service and the connection of the companies inter se. * * * But it is insisted that the appellant was not the plaintiff's master at the time of the injury. The plaintiff was doing what the appellant employed him to do. The master cannot escape his liability by fixing liability upon another. Both are charged. But, under the facts presented in this record, the plaintiff was the servant of all the companies interested in the union yard. Each of them owed him the duty of a master. The duty and the liability would be delusive, if at one moment the employee was the servant of one, at another the servant of another; here in the care of one, and there of another; as to the track dependent upon one company, as to the cars upon another, as to the movement of the engine upon a third. The policy, which requires of the master ordinary care, would be practically without sanction, if the servant's remedy was hidden in such a labyrinth."

In the case just referred to it was held that where there are several masters of the same servant, in a situation like that described, all the masters are liable for the negligence of one towards that servant; and, conversely, it is true that all of the masters are liable for the wrongful act of the joint servant towards third parties while acting within the scope of his duties. Goodman v. Wilson, 129 Tenn. 464, 166 S. W. 752, 51 L. R. A. (N. S.) 1116; Moore v. Southern Railway Co., 165 N. C. 439, 81 S. E. 603, 51 L. R. A. (N. S.) 866, and note. In this note, it is said:

"The great weight of authority is to the effect that joint employers are liable both jointly and severally for the torts of an employee, and this

The soundness of the proposition is proven by the numerous cases cited in support of it, which may be there found fully digested.

Note.—*Liability of All of Joint Masters where Employe was Acting Apparently in Interest of One.*—It would seem not difficult to conclude, that each and all of several masters come under the principle *respondeat superior,* where their common servant does a wrong in furtherance of the common business. But in a case where at the time of the commission of the wrong he does something in a way separable so as to apply to his duty to a single employer the question would not appear so certain. Take for example a joint agent at a common station of two or more railroads, his duties to the several masters not being necessarily contemporaneous, as for example with regard to passengers on their respective trains. It is conceivable that one railroad might give him certain directions as to passengers on its trains, and another might give him different directions as to passengers on its trains.

We think the instant case does not present separable duty so strongly as in the supposition we have made. The policeman was on his rounds and it was purely a fortuitous circumstance that the apparent trespasser happened to be on particular premises. In the case I have supposed the ground of action is in duty a particular railroad owes to its passengers and violation of that duty by its servant and not by the common servant of it and another. And if the other railroad is joined with it as defendant, the latter owes to the passenger of the other merely a duty to a licensee, while the railroad of which he is a passenger owes a still higher duty. This reparableness in measure of obligation seems to imply that there ought to be separableness in the fact of any obligation at all.

Moore v. So. Ry. Co., 165 N. C. 439, 81 S. E. 603, 51 L. R. A. (N. S.) 866, shows a case where a joint agent of two railroad companies was handling baggage of one of them and inflicted an injury on another servant of such joint masters. Though he was employed to look after all baggage that came into the station, it was a fact that at the time of the injury he was particularly engaged in looking after the baggage of only one of the companies. The suit was against the other and judgment in favor of plaintiff was affirmed.

A dissent by two of the judges says: "While under the statutes of North Carolina these two railway corporations are compelled to co-operate in maintaining a union station in Winston-Salem, they are not and cannot be in any sense co-partners, and neither is liable for the contracts or torts of the other. The fact that the Southern Railway assisted in maintaining this union station, and employed Wall to load its baggage, did not make it responsible for Wall's acts when he was acting exclusively for the Norfolk & Western (Ry. Co.) in checking and loading its baggage." It is also recited that the Southern Railway train had been loaded with baggage and gone

The majority opinion cites as exactly in point, in support of its view of liability of the other company, G. C. & S. F. R. Co. v. Dorsey, 66 Tex. 148, 16 S. W. 444. This case showed that a night switchman in a union yard, maintained by defendant and two other companies, while performing his duty upon a train and track of one of the other companies, was injured by its negligence. There was averment of defective track belonging to all the companies and of defective cars belonging to the other company. The court said, however, that: "But if the track was safe and the injury was caused solely by defect in the cars of the other defendant, both defendants were liable" under prior decision. It was also said: "Under the facts the plaintiff was the servant of all the companies interested in the union yard. Each of them owed him the duty of a master. The duty and the liability would be delusive, if at one moment the employe was the servant of one, at another the servant of another; here in the case of one, and there, of another; as to the track, dependent upon one company, as to the cars, upon another, as to the movement of the engine, upon a third."

We do not think this fair argument. It is a fanciful rather than a reasonable illustration that is presented. One railroad has no control over the rolling stock of another nor over the way it is handled. If there was a common track which each one was bound to see kept up properly, there would be better reason to urge all responsible for any defect therein, but not where it has no responsibility as to the separate rolling stock used thereon.

In Buchanan v. R. Co., 75 Iowa 393, 39 N. W. 663, the facts show a flagman, the common employe of three railroad companies, stationed at a street crossing. A traveler to whom he signaled to come on was injured by an approaching train belonging to one of the companies. It was held that all of the companies were liable. It is easy to see why this holding might be sound and that in the two cases above not sound. It was the servant's duty to warn members of the public against a danger from trains, and not merely against danger from particular trains. The running of the train was proper, but the negligence of the common employe was the proximate cause of injury. The court said: "The property in the different tracks and the owners of the trains do not enter into the question. There was evidence * * * that each of these companies was responsible for the flag service at the crossing."

In Brow v. R. Co., 157 Mass. 399, 32 N. E. 362, which with the Buchanan case is cited by the Moore case in its support, is the same in principle as the Buchanan case, the injury arising out of the fault of a gateman the common employee of several railroads. The Supreme Judicial Court in reversing a decision by the lower court in favor of defendant, because the injury was by the train of another company, said: "Undoubtedly a case can be stated in which a gateman would be regarded as the separate agent of each of the railroads. We think, however, that one inference

ble that the jury might find that all of the roads "employed a common agent, for whose torts in the performance of his duty each and all were responsible." We do not think this case very strong support for the Moore case.

In Gulf C. & S. F. Ry. Co., 96 Tex. 301, 72 S. W. 165, the Dorsey case *supra* was reaffirmed in a case where a passenger was on one of the trains of the other common master of a switching crew. But the passenger was injured after he alighted by direction of the common agents in the performance of their general duties.

Illinois C. R. Co. v. King, 69 Miss. 852, 13 So. 824, has little relation to the question of separable duty, it showing an arrest by a depot master of plaintiff for disorderly conduct at the common depot.

In Penfield v. R. Co., 26 App. Div. (N. Y.) 413, 50 N. Y. Supp. 79, 4 Am. St. Rep. 449, defendant undoubtedly was liable as it was its passenger that sued for expulsion from a common depot by a common agent of several railroads. A significant observation in the opinion is that: "However it may be as to third persons, as between defendant and its passengers the station officer at Indianapolis was the defendant's servant, for whose acts within the scope of his duty and employment, the defendant was liable."

There are many cases where flag men and gate tenders were negligent and injury resulted which hold the joint employers all liable, but as indicated above we do not think them controlling. See for example, Denver & R. G. R. Co. v. Gustafson, 21 Colo. 393, 41 Pac. 505; Schulte v. L. & N. R. Co., 128 Ky. 627, 108 S. W. 941; Boucher v. R. Co., 196 Mass., 355, 82 N. E. 15, 13 L. R. A. (N. S.) 1177.

C.

HUMOR OF THE LAW

A man had his purse stolen and unfortunately it contained a good deal of money. One day to his great surprise he had a letter from the thief, inclosing a small portion of his property. The letter ran as follows:

"Sir: I stole your munny. Remawse is noring at my conshense, so I send sum of it back. Wen it nors agen I will send sum more."—American Legal News.

The law firm of Johnson & Stout received a letter, which they have sent to The Docket, which will bear republishing. The leter is as follows:

Dear Sir:

Mr. Neerbauer killed himself a few days ago here and won't have time to come down for a

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort, and all the Federal Courts.

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1. **Abandonment**—Non-User.—Non-user of a right, under a contract, coupled with circumstances showing an intention to abandon, when acted upon by the other party interested, destroys the right acquired.—Ray Coal Mining Co. v. Ross, Iowa, 151 N. W. 63.

2. **Abatement and Revival**—Negotiable Notes.—The holder of negotiable notes, transferring them after instituting suit thereon, was entitled to enter and prosecute such suit to the use of his transferee.—Colmary v. Fanning, Md., 92 Atl. 1045.

3. **Action**—Statutory Duty.—Where a statutory duty was created for another than plaintiff, and the advantage to be derived by plaintiff is merely incidental, he cannot sue for breach of the duty.—State ex rel. Louisiana Trust & Savings Bank v. Board of Liquidation of State Debt, La., 67 South 370.

4. **Admiralty**—Suit in Personam.—A suit in personam against shipowners for work and materials in repairing vessel in which an attachment was for the purpose only of satisfying personal judgment is not within exclusive admiralty jurisdiction of the federal courts, under Judicial Code, § 24, saving to suitors the common-law remedies.—Rounds v. Cloverport Foundry & Mach. Co., 35 Sup. Ct. Rep. 596.

5. **Attorney and Client**—Contract.—A contract entitling attorney to 30 per cent of any recovery in proceedings to set aside a will or until certain trusts in toto, held not to require the tached, but not bills of lading.—First Nat. Bank of Mifflintown v. First Nat. Bank of New Kensington, Pa., 92 Atl. 1076.

7. **Bills and Notes**—Assignment.—Where a third person paid a note and obtained an assignment to surrender to the makers in consideration of an assignment of fire policies later adjudged invalid by a bankruptcy court, he could sue on the note.—Baskerville v. Hughes County Co-op. Store, S. D., 151 N. W. 41.

8.——Assignment.—Where defendant executed a note and mortgage for machinery knowing that the payee intended to negotiate it, relying on his promise to repair the machinery, his failure to do so was unavailable to defendant as against a bona fide assignee.—Gibbes Machinery Co. v. Hamilton, S. C., 84 S. E. 296.

9.——Estoppel.—If one who can read signs a note without reading it or without a satisfactory excuse, he is guilty of such negligence as will prevent him from asserting he was misled as to its contents.—Shenandoah v. Hall, Iowa, 151 N. W. 120.

10.——Indorsee.—The fact that the maker who first signed a note, which it thereafter altered so as to be payable to bearer, indorsed the note with two others before delivering it to plaintiff, did not make the plaintiff an indorsee as to the other maker.—Builders' Lime & Cement Co. v. Weimer, Iowa, 151 N. W. 100.

11. **Carrier of Goods**—Free Haul.—The full local rate cannot be charged for transportation of property and troops of the United States over the non-free-haul portion of a through shipment over a continuous line of railway, part of which, under Act July 25, 1866, § 5, is free-haul and the remaining part non-free-haul under Act July 1, 1862.—Southern Pac. Co. v. United States, 35 Sup. Ct. Rep. 573.

12.——Limitation of Liability.—A carrier in interstate commerce may limit its liability for goods injured by its negligence by contract fixing the agreed value of goods between it and the shipper, but not by mere stipulation in the bill of lading.—Central of Georgia Ry. Co. v. Broda, Ala., 67 So. 437.

13. **Carriers of Passengers**—Street Cars.—A person standing on the steps of a moving street car, without being able to secure a seat or standing room within, is presumed to be there with the consent of those in charge of the car.—Kadner v. Omaha & C. B. Ct. Ry. Co., Neb., 151 N. W. 169.

14. **Champerty and Maintenance**—Soliciting Business.—It is not champerty or maintenance for an attorney to solicit business, advance money to a poor client for living expenses, or advise the client against a settlement.—Johnson v. Great Northern Ry. Co., Minn., 151 N. W. 125.

15. **Commerce** — Constitutional Law.—Pub. Laws 1913, c. 44, § 5, relative to record to be kept by transportation companies of shipments of intoxicating liquors, held not in conflict with the commerce clause of the federal Constitution, in view of Webb Kenyon Law.—State v. Sea-

terstate commerce, is such a participation therein as to bring plaintiff within the Federal Employers' Liability Act.—Baltimore & O. R. Co. v. Whitacre, Md., 92 Atl. 1060.

17.——Unlawful Burden.—Requirement that certain villages must be given two passenger trains each way each day under St. Wis. 1898, § 1801, as amended by Laws Wis. 1911, c. 483, without regard to the adequacy of the existing passenger service, is an unlawful burden on interstate commerce as applied to road running only interstate trains.—Chicago, B. &. Q. R. Co. v. Railroad Commission of Wisconsin, 35 Sup. Ct. Rep. 560.

18. **Constitutional Law**—Due Process of Law.—There is no denial of due process of law guaranteed by Const. U. S. Amend. 14, in practice in Georgia, that accused may waive his right to be present when the jury renders its verdict, and waiver is inferred by a motion for new trial on other grounds alone.—Frank v. Mangum, 35 Sup. Ct. Rep. 582.

19.——Forfeiture.—There was no want of due process of law in proceedings under Pol. Code, Cal. § 3897, forfeiting land for non-payment of taxes because the state, having become vested with title with no offer to redeem, sold the land for $166 to satisfy a tax amounting, with penalties, to but $16.19.—Chapman v. Zobelein, 35 Sup. Ct. Rep. 518.

20.——Process.—Courts of one state may not, without violating due process of law clause of Const. U. S. Amend. 14, render money judgment against a corporation of sister state on service of a resident director, where the corporation does no business in the state.—Riverside & Dan River Cotton Mills v. Menefee, 35 Sup. Ct. Rep. 579.

21. **Convicts**—Guardian.—A defendant, who, pending a suit against him, was imprisoned in the penitentiary, waived his right to the appointment of a guardian, where his counsel appeared for him.—Cobb v. Garlington, S. C., 84 S. E. 302.

22. **Corporations**—Assessment on Stock.—A valid assessment of $40 per share on stock held a good defense to an action for the price, as being within seller's implied warranty of clear title.—Martin v. McDonald, N. C., 84 S. E. 258.

23.——Jurisdiction.—The courts have no jurisdiction over an action by a stockholder of a foreign corporation for dividends, where the action involves a determination of the validity of a reorganization of the corporation.—Hogue v. American Steel Foundries, Pa., 92 Atl. 1073.

24.——Misappropriation.—Where money deposited by directors of corporation to a "special" account was applied to reducing an overdraft by the corporation, it was not misappropriated or diverted from corporate uses, and, as the corporation could not recover it back, the receiver representing it had no greater rights.—Folsom v. Smith, Me., 92 Atl. 1003.

25. **Courts** — Jurisdiction. — Jurisdiction of federal court of a suit by New York telegraph is an unexplained averment by a telegraph company that it had accepted provisions of Act July 24, 1866.—Louisville & N. R. Co. v. Western Union Tel. Co., 35 Sup. Ct. Rep. 598.

26.——Reliance on Decision.—A decision on which parties have relied in making a contract will be followed unless there is some valid reason for overruling it, though it be in conflict with decisions of other jurisdictions.—Jordan v. McKenzie, Me., 92 Atl. 995.

27. **Covenants**—Warranty of Title.—A deed by J. and S., reciting that they will warrant and defend the title, and that the special warranty applies only to S., contains a general warranty as to J, and a special warranty as to S.—Spencer v. Jones, N. C., 84 S. E. 261.

28. **Criminal Law**—Argument.—In a prosecution of the driver of an automobile for manslaughter in killing a child, argument of state's attorney is not error because oratorical and an appeal to sympathy, where he does not bring in matters not in evidence.—State v. Beiwen, Iowa, 151 N. W. 102.

29.——Sentence.—That person sentenced to death for arson was undergoing life imprisonment for murder under prior conviction did not prevent execution of death sentence.—State v. Rodgers, S. C., 84 S. E. 304.

30. **Damages** — Personal Exposure.—Where exposure to weather or cold results in further physical debility to a person already sick or feeble, damages for causing such exposure may be recovered in a proper case.—Seaboard Air Line Ry. Co. v. Standifer, Ala., 67 So. 391.

31.——Surface Water.—A lower proprietor is under no duty to avoid damages to his land from surface water diverted upon it by an upper proprietor by carrying off such water in ditches.—Barcliff v. Norfolk Southern R. Co., N. C., 84 S. E. 290.

32. **Deeds**—Condition Subsequent.—If a grantor is in possession when breach of condition subsequent happens, the estate revests in him without formal act, and he will be presumed to hold to enforce the forfeiture, unless he waives the breach.—Britton v. Taylor, N. C., 84 S. E. 280.

33.——Judgment.—Conveyance by person who had recovered possession of land by decree authorizing defendant to remove buildings, held not to convey articles in the buildings or in or on the land that were not fixtures.—Saye v. Hill, S. C., 84 S. E. 307.

34. **Divorce**—Separation.—Where a letter from plaintiff wife, in a divorce suit, to her husband, requesting that he postpone their going to housekeeping until spring went unanswered, it was not an absolute agreement to a separation until that time.—Tipton v. Tipton, Iowa, 151 N. W. 90.

35. **Ejectment**—Change of Parties.—Where ejectment was begun by heirs, and the complaint was amended by striking the names of all of the heirs except one, who was appointed administrator, leaving him suing as administrator, there was not a complete change of parties plaintiff.—Randolph v. Hubbert, Ala., 67 So. 416.

36. **Eminent Domain**—Assessment of Damages.—In the absence of a statutory require-

37.——Riparian Owners.—Riparian owners who have erected on a water front wharves conforming to harbor line adopted by the federal government have no right to compensation under Const. U. S. Amend. 5, where Congress establishes a new harbor line requiring destruction of a portion of such structures.—Greenleaf-Johnson Lumber Co. v. Garrison, 35 Sup. Ct. Rep. 551.

38. **Estoppel**—Judgment.—A judgment creditor held estopped by his conduct and statements in court from asserting that a claimant of property levied under execution against the judgment debtor was the same person as the judgment debtor.—Millitello v. B. F. Roden Grocery Co., Ala., 67 So. 420.

39. **Execution**—Void Process.—In the statutory suit to claim property upon which execution was levied, where the process is not void on its face, the claimant cannot question the regularity of either the judgment or the execution.—Millitello v. B. F. Roden Grocery Co., Ala., 67 So. 420.

40. **Fixtures**—Machinery.—Houses built under license or lease and machinery installed therein with appearance of permanency, held not fixtures if built and installed under agreement for and with intention to remove.—Saye v. Hill, S. C., 84 S. E. 307.

41. **Habeas Corpus**—Due Process of Law.—Habeas Corpus will not issue out of a federal court in behalf of one convicted of crime who asserts existence at trial of mob domination, and denial of due process of law guaranteed by Const. U. S. Amend. 14, which questions were submitted to the trial court and passed upon by the highest state court.—Frank v. Mangum, 35 Sup. Ct. Rep. 582.

42. **Homicide**—Defense of Mother.—Where defendant killed his father in defense of his mother, held that it was not necessary, as a matter of law, that he should have warned his father before firing at him.—State v. Nicola, Iowa, 151 N. W. 70.

43.——Evidence.—That the driver of an automobile, after striking a child, moves on without stopping or tendering assistance, is a circumstance indicative of guilt, in a prosecution for manslaughter.—State v. Biewen, Iowa, 151 N. W. 102.

44. **Homestead**—Lien of Creditors.—A homestead secured subsequent to the issuance of a decree providing for sale of the property to satisfy claim of creditors, but previous to such sale being made, held superior to the creditors' lien under the decree.—Barnes & Co. v. Buchanan, Miss., 67 So. 462.

45. **Husband and Wife**—Funeral Expenses.—Where there is no express promise by a wife or circumstances showing that the expenses of her last sickness and her funeral expenses were furnished on her credit or that of her estate, the husband is primarily liable.—Bowen v. Daugherty, N. C., 84 S. F. 265.

46.——Gift.—Where a wife claimed money in a bank as a gift from her husband, a subsequent entry in her bank book making it subject to his order, either, or the survivor, was not a gift by her to him.—Colmary v. Fanning, Md., 92 Atl. 1045.

47. **Indians**—Secretary of Interior.—Authority given Secretary of Interior by Reclamation Act June 17, 1902, to acquire for United States interests in property, empowers him to acquire for cash and grant of selection of other lands the lands in the Blackfeet Indian Reservation occupied by an Indian family under agreement of agents in all that they do in preparing the application.—French v. State Farmers' Mut. Hail Ins. Co., N. D., 151 N. W. 7.

50.——Benefit Association.—An association incorporated in Massachusetts as a "fraternal union" to aid members, their dependents, widows, and orphans, held a "beneficial association," and not an insurance company.—Ogle v. Barron, Pa., 92 Atl. 1071.

51.——Policy.—The amount payable under a life policy in the event of death must appear in the policy, and is not to be ascertained through a search of the by-laws and constitution of the insurer.—McPike v. Supreme Ruling of the Fraternal Mystic Circle, Mo., 173 S. W. 71.

52.——Suspension.—Under policy of insurance prohibiting incumbrances or changes in title or interest, chattel mortgages held merely to suspend insurance, which, therefore revived upon payment and cancellation of the mortgage.—Cottingham v. Maryland Motor Car Ins. Co., N. C., 84 S. E. 274.

53. **Intoxicating Liquors**—Keeping on Hand.—A temporary deposit of intoxicating liquor in a place of business while the liquor is being transported from a place where lawfully received to a place where it might be lawfully deposited comes within the definition of the term "keep on hand," as used in Pen. Code 1910, § 426.—Brown v. State, Ga., 84 S. E. 327.

54.——License to Sell.—Resident freeholders, counted on a petition for a village liquor license or to make a larger number of signers necessary in a village of less than sixty freeholders, must own real estate in the village in good faith, and not merely to prevent the granting of a license.—In re Winterringer, Neb., 151 N. W. 162.

55. **Landlord and Tenant**—Flooding Crops.—Flooding of land delaying planting, and so indirectly causing the injury of the crop by frost, held not to constitute a destruction by water, within a provision in the lease exempting tenant from liability for rent of lands, should the crops suffer destruction by water.—Morey v. Feltz, Mo., 173 S. W. 82.

56. **Libel and Slander**—Presumption of Damage.—In an action for libel, the charge being actionable per se, the law presumes such general damage as mental suffering and injury to loss of reputation, which need neither be alleged nor proven.—Starks v. Comer, Ala., 67 So. 140.

57. **Liens**—Statute of Limitations.—That plaintiff had purchased one of its mortgages long after it became barred by limitations, held not to exonerate defendants from paying the sum due on such mortgage as a condition to obtaining affirmative relief.—D. S. B. Johnston Land Co. v. Mitchell, N. D., 151 N. W. 23.

58. **Limitation of Actions**—Account of Action.—Where defendant railroad company ditched a swamp and later enlarged the ditches, thereby causing an overflow of surface water on plaintiff's land, the latter's cause of action accrued at the time of the enlargement of the ditches for purposes of calculating the period of limitation of his right of action.—Barcliff v. Norfolk Southern R. Co., N. C., 84 S. E. 290.

59. **Master and Servant**—Assumption of Risk.—That a servant imprudently exposed himself in obeying the master's order will not preclude him from recovering for an injury directly traceable to some independent act of the master, as to which the servant was not chargeable with assumed risk.—Cherokee Brick Co. v. Hampton, Ga., 84 S. E. 328.

60.——Contributory Negligence.—The court

space between a platform and a car, whereby the board slipped as plaintiff was wheeling freight over it, held actionable negligence.—Stash v. Great Northern Ry. Co., Minn., 151 N. W. 124.

63.——Proximate Cause.—A tin drinking cup not being essential to the operation of a train, failure of the railroad to furnish it cannot be said to be negligence, so as to render it liable for injury to a brakeman when seeking one.—Baltimore & O. R. Co. v. Whitacre, Md., 92 Atl. 1060.

64.——Warning.—Where an employe voluntarily goes outside the scope of his employment without permission or his employer's knowledge and is injured, the employer is not liable for failure to warn him so as to prevent the injury.—Blackman v. Western Electric Co., Neb., 151 N. W. 152.

65.——Warning.—Where plaintiff notched trees ahead of the sawyers, and it was either the custom for them to warn him when the fall of a tree was imminent, or they agreed to, plaintiff may recover where injured owing to the sawyers' failure to give warning.—Chapman-Dewey Land Co. v. Woodruff, Ark., 173 S. W. 188.

66. **Mechanics' Liens**—Material Man.—A materialman could apply a payment by a contractor to the oldest items on his account, though they did not include items for which the payment was made to the contractor, if no directions for application were given.—St. Louis Sash & Door Works v. Tonkins, Mo., 173 S. W. 47.

67. **Mines and Minerals**—Improvements.—Cost of improvements and operations under an oil lease while ignorant of an earlier recorded lease should be deducted when lessees are required to account to holders of earlier lease as to oil sold, but no reduction should be made for expenses after knowledge of prior lease.—Guffey v. Smith, 35 Sup. Ct. Rep. 526.

68. **Mortgages** — Consideration.—Where the application for a loan on mortgage directs the money to be paid to a particular individual, payment by the mortgagee to any other person is at his own risk and may result in the mortgage and notes being void for lack of consideration.—Shade v. Barnes Bros., S. D., 151 N. W. 42.

69.——Priority.—One, paying the first maturing of notes secured by mortgage, and to whom the mortgagee transfers it in furtherance of the mortgagor's agreement that he shall hold it as collateral, is not entitled to priority of payment, over the other notes out of the mortgaged property.—Arnett v. Willoughby, Ala., 67 So. 426.

70. **Municipal Corporations**—Assessment.—Where a street railway was bound to pay for the paving of the portion of the street occupied, property owners' proportionate part of the cost should be estimated after deducting the amount paid by the railway company.—Morris v. City of Hendersonville, N. C., 84 S. E. 260.

71.——Constitutional Law.—An ordinance providing that certain circumstances, when established by evidence, should raise a prima facie presumption of guilt, which promulgates the same rule as the Fuller Bill, infracts no constitutional provision.—Borok v. City of Birmingham, Ala., 67 So. 389.

72.——Flushing Sewers.—City which flushed streets and sent the water, with street refuse, into a private sewer, thereby choking it, held not liable to a property owner who connected with such sewer without the owner's permission, and in violation of city ordinances.—Van Trump v. Kansas City, Mo., 173 S. W. 32.

73.——Governmental Duty.—A town is not liable for fault in the location, size, plan of construction, or general design of its sewers, but it may be liable for failure to keep them in repair.—Sherburne v. Inhabitants of Sanford, Me., 92 Atl. 997.

75. **Navigable Waters**—Channel and Dock Companies.—Under Rev. St. 1911, arts. 1249-1251, relating to the creation and powers of channel and dock companies, a corporation chartered to dredge a channel across Galveston Bay cannot, while inactive, hold lands granted it for use in that work indefinitely.—West End Dock v. State, Tex., 173 S. W. 285.

76.——Secretary of War.—Authority of Secretary of War under Act March 3, 1899, to establish harbor lines may be exercised to widen the Elizabeth river to permit mooring of war vessels in front of Norfolk Navy Yard.—Greenleaf-Johnson Lumber Co. v. Garrison, 35 Sup. Ct. Rep. 551.

77. **Negligence**—Proximate Cause.—Before a thing can be said to be probably true, as a result of a negligent act, it must appear that, in the natural course without any intervening, moving cause, the result usually and ordinarily happens.—Bernstein v. Western Union Telegraph Co., Iowa, 151 N. W. 108.

78. **Partition**—Reversion.—Where complainant owned a present interest and was entitled to possession, he was entitled to partition, although it involved the setting apart of interests in reversion or remainder.—Wheat v. Wheat, Ala., 67 So. 417.

79. **Partnership**—Equality of Partners.—Provisions of a partnership agreement reserving to one partner the right to purchase the assets and business in case of disagreement, held not objectionable as destroying the equality of the partners.—Phillips v. Crownfield, Md., 92 Atl. 1030.

80.——Realty.—Partnership realty is for many purposes treated as personalty, the ownership partaking of the nature of a tenancy in common, and of a joint tenancy, but in reality the legal title being held in trust for the firm or the firm creditors.—Western Securities Co. v. Atlee, Iowa, 151 N. W. 56.

81. **Principal and Agent**—Estoppel.—One executing a deed to land and intrusting it to his son without any notice to the purchaser of limitations such son's authority to act for him held estopped to deny the son's authority to receive payment for the land.—Roberts v. Akers, Ky., 173 S. W. 164.

82. **Public Lands**—Patentee.—Right of patentee under the homestead laws to recover for timber willfully cut by a trespasser after homesteader's entry, but before possession, is not defeated by settlement between the United States and the trespasser.—Knapp v. Alexander-Edgar Lumber Co., 35 Sup. Ct. Rep. 515.

83. **Railroads**—Contract.—A contract for construction of a siding and releasing the railroad company from claims for damages from fire construed and held to release it from damages by fire from engines on the main line, as well as those on the siding.—West Virginia Pulp & Paper Co. v. Baltimore & O. R. Co., W. Va., 84 S. E. 334.

84.——Pleading.—In a suit against a railroad for injury relying upon simple negligence, plaintiff must aver and prove a relationship that would render the defendant liable for simple negligence; that is, that he was not a trespasser.—Empire Coal Co. v. Martin, Ala., 67 So. 435.

85.——Proximate Cause.—An automobile owner, who approached a railroad crossing at a speed unlawful under Laws 1913, c. 107, is not barred from recovery, as a matter of law, but can have the jury determine the question of proximate cause.—Shepard v. Norfolk & S. R. Co., N. C., 84 S. E. 277.

86. **Receivers**—Domestic Creditors.—Domestic creditors of an insolvent foreign corporation held entitled to attach funds due it from citizens of this state, though a receiver had been appointed by the federal court in the foreign state.—Guimarin v. Southern Life & Trust Co., S. C., 84 S. E. 298.

Precedent.—A return [illegible] from de-

88.——Fraud.—Release being invalid, if procured by fraud, or if injured person was mentally incapable of understanding it, instruction requiring findings of both facts, and finding that it was mutually understood that the payment was for lost time, was too favorable to defendant.—Louisville & N. R. Co. v. Winkler, Ky., 173 S. W. 151.

89.——Fraud.—To authorize avoidance of a formal written release on grounds of fraud and misrepresentations or mental incapacity, the evidence thereof must be clear and convincing beyond reasonable controversy.—Pope v. Bailey-Marsh Co., N. D., 151 N. W. 18.

90. **Sales**—Breach of Warranty.—Purchaser of animal, who on breach of warranty never offered to return, could reduce the price only to the extent of the difference between its value and its value as warranted, unless it was of no value or of less value than the amount paid on the price.—Walls v. Tinsley, Mo., 173 S. W. 19.

91.——Delivery.—A buyer's mere promise, without consideration, to obtain possession of the goods from a carrier by putting up a bond for delivery, held not a delivery and acceptance.—George Gifford Co. v. Willman, Mo., 173 S. W. 53.

92.——Evidence.—In an action for the buyer's breach of a sale contract, testimony that the seller made a contract similar to the one claimed by the buyer to have been made by him was not admissible.—Winborne Guano Co. v. Plymouth Mercantile Co., N. C., 84 S. E. 272.

93.——Lex Loci Contractus.—A reservation of title to goods held, as against the buyer's creditors, governed by the law of Arkansas, and not by the law of Pennsylvania, where the order was accepted by seller and the goods shipped.—Summers v. Carbondale Mach. Co., Ark., 173 S. W. 194.

94.——Warranty.—Where the buyer, relying on the seller's warranty, planted seeds bought, though in doubt as to their fitness, he did not thereby waive the warranty or his right to set up total failure of consideration in an action for the price.—Backes v. Cook, Neb., 151 N. W. 175.

95. **Schools and School Districts**—Irregularities.—That the registrar prior to a school bond issue election was absent during some days, and that names were placed on the books by an unauthorized person, etc., were mere irregularities which were not fatal, in the absence of proof that they affected the result.—Casey v. Dare County, N. C., 84 S. E. 268.

96. **Shipping**—Negligence.—That a passenger on boarding a boat slipped on the gangplank held to raise no presumption of negligence, and the passenger is bound to prove the negligence averred.—Pillard v. Chesapeake S. S. Co. of Baltimore, Md., 92 Atl. 1040.

97. **Specific Performance**—Partnership.—A legal contract for the sale of the realty of a partnership may be enforced against the proper parties; and a contract for the sale of its personalty, which partakes of the nature of realty, may be specifically enforced.—Western Securities Co. v. Atlee, Iowa, 151 N. W. 56.

98. **Street Railroads**—Last Clear Chance.—Where a motorman, after seeing, or by the exercise of reasonable care he could have seen, a traveler on the track, did everything that a reasonably prudent man would do, there could be no recovery for injuries in a collision.—McGowan v. Wilmington & P. Traction Co., Del., 92 Atl. 1015.

99.——Negligence.—A driver of a horse attached to a buggy is not necessarily guilty of any negligence in driving on, or not preventing in bad health a few days before his death, held a resident of Missouri, within Rev. St. 1909, § 309, relative to inheritance taxes.—State, to Use of Knox County Collector, v. Bruce, Mo., 173 S. W. 101.

102.——Warrant.—A warrant to one holding the offices of town treasurer and collector issued to him as town treasurer, and requiring him to collect taxes and pay the same into the treasury of the town, is sufficient.—Pendleton v. Briggs, R. I., 92 Atl. 1024.

103. **Telegraphs and Telephones**—Consequential Damages.—In action for delay in forwarding telegram, founded upon contract, the sender is entitled only to proximately resulting damages, but in an action in tort may recover conseqential damages not within contemplation of parties.—Bernstein v. Western Union Telegraph Co., Iowa, 151 N. W. 108.

104.——Mental Anguish.—In an action for delay in delivery of a telegram, plaintiff cannot recover for mental anguish, unless there is a right to recovery aside from such injuries.—Western Union Telegraph Co. v. Appleton, Ala., 67 So. 412.

105.——Punitive Damages.—Punitive damages for mistake in transmission of a telegram could not be recovered, in the absence of a showing by plaintiff that the receiving agent understood the message or was negligent in failing to understand it.—Painter v. Western Union Telegraph Co., S. C., 84 S. E. 293.

106. **Trusts**—Fiduciary Relation.—Where a fiduciary relation required defendant to render to plaintiff an accounting, and plaintiff traced funds into the hands of defendant, the latter must show that he has properly disbursed the funds.—Cobb v. Garlington, S. C., 84 S. E. 302.

107.——Husband and Wife.—Where a husband and wife conveyed certain land to their daughter in consideration of support for life, the husband, after the wife's death, in the absence of breach of contract by the daughter, could not have her declared a trustee of the land.—Walker v. Maddox, Ky., 173 S. W. 137.

108.——Income.—Where wild timberland was the subject of a trust, the income of which was bequeathed to life tenants and the corpus to remaindermen, the income consisted of the annual growth of the timber.—Bartlett v. Pickering, Me., 92 Atl. 1008.

109.——Mortgages.—Mortgagee held a trustee for the mortgagor, as to difference between the consideration named in the mortgage and the amount actually advanced by the mortgagee as agent for the mortgagor.—Compton v. Collins, Ala., 67 So. 395.

110. **United States**—Construction Work.—Extra expense over what would have been necessary had the materials to be excavated been as represented by the government boring sheets should be allowed contractors relying on such borings, which the specifications falsely stated represented, as far as known, the materials to be excavated.—Christie v. United States, 35 Sup. Ct. Rep. 565.

111. **Usury**—Mortgage.—That a usurious account was brought into a mortgage and consolidated with assumed debts of the mortgagor which were not themselves tainted with usury did not render such debts usurious.—Compton v. Collins, Ala., 67 So. 395.

112. **Water and Water Courses**—Ordinance.—An ordinance granting to a public service corporation the right to furnish water at flat or meter rates gives to the corporation the right to install meters on any service pipe and to charge meter rates and rents.—Birmingham Waterworks Co. v. Windham, Ala., 67 So. 424.

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UNIFORM LAW ON PARTNERSHIP—SEPARATE LIABILITY OF MEMBERS AND ITS ENFORCEMENT.

A statement by Mr. Walter George Smith, in a leading article in this issue of the Central Law Journal, of the main features of the Uniform Partnership Act recommended by the Conference of Commissioners on Uniform State Law, is very timely.

Mr. Smith is distinguished among his brethren as one of the active members of the Commission on Uniform State Laws, and hardly, we think, has there been thought a greater need of uniformity in law and its construction, amongst the states, than in that of partnership.

The legal entity idea we perceive to be rejected by the recommended act, and this we consider to be a wise decision by the Commissioners.

In evolution, however, of the opposite theory—association of individuals—many things have cropped out, which confuse in regard to the application of common law rules. The corporate theory is unsatisfying in many ways, inasmuch as it minimizes individual responsibility and tends to undermine confidence in credit. But, when we overleap and fall on the other side of associated and several responsibility, we may be pushing the trust that one partner reposes in another too far.

There is an inequality between a partner with ample pecuniary responsibility back of him and one not so fortunate. The bridge between the two may not be wholly supplied by confidence in integrity, because there are mistakes and misadventures which [illegible] responsibility merely may not be because of the good name or financial worth of his associate.

There is a happy mean to be observed in partnership ventures, and finding this we imagine to be the difficulty which has engaged for so long a time the attention of the Commissioners.

It seems to us, that a certain speedy way of subjecting an irresponsible partner's interest in a firm to his creditors' demands is not only salutary as to him, but it also will operate as a check upon his living beyond his means and thus embarrassing him in his duty to his firm. If he gets involved by reason of individual ventures in business, a quick remedy as to his interest in a firm, would tend, it would seem, the more to secure his entire attention to the business of the firm.

The day would seem to have passed, when mere influence, financial or individual, takes the place of service in business undertakings. There may be harmful interlocking of interests by partners as well as by corporate directors. It is these things that detract from efficiency in the business world, and magnify merely accidental advantages. Therefore it is distinctly on the side of policy which discourages these harmful things, that partnership law should be justly expounded, and that it should be expounded in one state just as it is in another.

We have seen, that courts often have made the efforts of our commissioners go awry, by harking back to old law, when statutes have sought to make a new rule. We hope, that example in adoption of this partnership act by Pennsylvania may be followed in other states and that the courts will view its interpretation so as to carry out the principle of the uniformity it aims at.

It has been the contention of this Journal, that this principle intends to cut away from old rules, or the hope of the framers of to remain after uniformity in enactment has been had, the commissioners are working to little purpose. Common law terms in such acts should never be employed where such terms receive different interpretation in different states, but, if they are used, they should be construed in their new setting. Our federal government has no common law of its own, but its legislation often employs common law terms. An uniform law would seem to be in the same category as a federal statute.

NOTES OF IMPORTANT DECISIONS

NEGOTIABLE INSTRUMENTS LAW—LIABILITY OF INDORSERS IN ORDER OF SIGNING.—N. I. L. provides that: "As respects one another, indorsers are liable prima facie in the order in which they indorse, but evidence is admissible to show as between them or among themselves they have agreed otherwise." In New York Supreme Court, Appellate Division, it was held by a majority of four to one, that where officers indorsed a corporate note and nothing was said at the time, that their common financial interest in the corporation overcame the presumption of successive liability arising from the order of their signing, and the last indorser was entitled only to contribution from the others where he paid the note that was indorsed. Strasburger v. Meyer Strasburger & Co., 152 N. Y. Supp. 757.

This extends, in a very latitudinarian way, the meaning of evidence of an agreement not to be bound according to the tenor of an unequivocal contract. The court said: "The common interest of the plaintiff and her son and the appellant, as owners in separate shares of the entire capital stock of the corporation, doubtless impelled them thus to become accommodation indorsers, with a view to protecting their financial interests; and in such circumstances the presumption arising from the order in which the names of the indorsers appear, if not overcome as matter of law, is sufficiently overcome, at least, to raise a question of fact, as to whether it was not the intention of the

dividual whim, and that circumstances having no necessary relation to a contract will yet be considered in its solution. It was just as easy for the signers in this case to take their signing out of the rule of certainty as it was for any other signers.

Ingraham, P. J., said that: "To justify the court in disregarding this express provision of law, there must be evidence to show that as between themselves they have agreed otherwise. * * * It is not, as I view it, the intention of the parties that controls, but there must be evidence of an agreement between the indorsers." It seems to us that there hardly may be any doubt of the correctness of the dissenting view.

COMMERCE — INTERSTATE CARRIER NOT IMMEDIATELY ENGAGED IN INTERSTATE TRANSPORTATION. Boyle v. Pennsylvania R. Co., 221 Fed. 455, decided by District Court, Eastern District of Pennsylvania, presents the narrow question whether or not a carrier, doing both an interstate and intrastate business, must be actually transporting passengers or freight in interstate commerce at the time its employe is injured, for an action for such injury to come under the Federal Employers' Liability Act.

The road of the carrier was known as the Schuylkill Division of defendant, and it lay wholly in Pennsylvania. Defendant company, as a part of its business, undertakes to carry passengers from any point on this division to any point on any of its other lines beyond the limits of said state, it having time tables accordingly and otherwise showing that this division is a part of a great interstate system.

Plaintiff's decedent was an employe of the system at a station on this division, and his death resulted from his being struck by an eastbound train while inspecting a westbound train, which should have cleared the station before the eastbound train came into the station. Neither of these trains had any passengers or baggage actually being transported in interstate commerce. The court held there was no cause of action under said act.

The court said: "If the act of Congress is confined to the fact of transportation, it is admitted that it does not apply to the instant case. Counsel contend, however, that the act carries a broader meaning, and is to be apthen in use as an instrument of interstate commerce is employed in such commerce, and being so employed is entitled to the protection given by the act of commerce. * * * We do not understand that the necessity for the presence of the two things required by the act of Congress has been denied by any ruling of the Supreme Court."

We should say also that the trains used by defendant on this division were not used to go beyond its tracks, but passengers were transferred to other trains.

It seems to be conceded that, if the train that killed deceased had been a through train, this injury would have been within the act of Congress. If this is so, then it seems to us, that what was virtually an arrangement in mere railroad management should not differentiate the matter. If a through car is an instrument in interstate commerce, then all cars which go to make up one through car are such instruments.

But independently of this suggestion, we think a daily business in interstate transportation, on some days passengers or freight therein and some days no passengers or freight therein, does not make the business intrastate. If it does, however, we think the ruling in Wabash R. Co. v. Hayes, 34 Sup. Ct. 729, allowing counts under federal law and under state law in the same petition, is a very good ruling to follow in almost any suit that is brought by an employe against a carrier engaged in interstate commerce.

JURISDICTION—ACTION ON SUPERSEDEAS BOND GIVEN IN FEDERAL COURT.—American Surety Co. v. Schultz, 35 Sup. Ct. 525, shows that there was a cause of action removed from a state to a federal court, because of diversity of citizenship, recovery of a judgment by plaintiff, its appeal and supersedeas bond thereon, and affirmance of the judgment in Circuit Court of Appeals. Plaintiff then sued the surety on the bond and it claimed there was no jurisdiction in federal court, because the parties were all residents of the state, and the suit "did not involve any controversy respecting the validity, construction or effect" of any federal law. This contention was overruled by the lower court and its judgment was affirmed.

defendant in the suit to prosecute an appeal in an effort to have it set aside. The judgment and the bond were wholly distinct and arose out of different laws—one out of the common law, the other out of a law of the United States. When the amount of defendant's liability for breach of contract had been adjudged by the federal court, the plaintiff was entitled at once to enforce payment by levy and sale. The laws of the United States, however, intervened and gave to the defendant a means of preventing immediate collection and possibly of defeating the judgment."

It is a little difficult to see that the litigation upon this bond does arise out of a law of the United States in the sense of the constitution, when there is merely a substitution of a bond for a common law indebtedness according to court procedure. The court says there is no substitution but it is not easy to understand why there is not. It stopped for a time enforcement of the judgment. Certainly there would be valid objection to jurisdiction where the common law judgment was sued upon, were there no diversity of citizenship, even though the judgment had been rendered by a federal court.

THE UNIFORM PARTNERSHIP ACT.

The state of Pennsylvania is the first to enact the Uniform Partnership Act, which was adopted by the Conference of Commissioners on Uniform State Laws at its session held in October, 1914. The subject had been under consideration by the conference since 1902. The draftsmen, William Draper Lewis, Esq., formerly Dean of the Law School of the University of Pennsylvania, and now one of its professors, based his work upon the English Partnership Act, upon tentative drafts prepared by the late James Barr Ames, Dean of the Law School of Harvard University, who was the first ex-

The act is based upon the theory that a partnership is not a legal entity but is an aggregate or association of individuals. A partnership is therefore defined to be "an association of two or more persons to carry on as co-owners a business for profit." There has been some differences of opinion as to the theory upon which the Partnership Act should be drawn. If the entity theory, which was that advocated by Dean Ames, had been adopted, a partnership would have been a legal person distinct from the members of the firm, and, as has been pointed out by Professor Samuel Williston, of the Harvard Law School, if this were the theory adopted, many of the principles of the law of corporations would become applicable, and logically the law of partnership would become a branch of the law of corporations.

The advocates of this theory are confronted with the fact that in some of the states there are constitutional provisions in regard to corporations and it would be highly inconvenient to the business world if partnerships were also subject to them, and, what seems to be a still stronger reason for discarding this theory is the fact "that the English and American law had substantially grown up" on the aggregate theory.

If partnerships were to be treated as corporations they would necessarily have to be registered. Every change of partnership would require a new certificate. It would affect seriously rights against the partnership of creditors who think they are dealing directly with individuals and "in reliance upon individual as well as collective responsibility."

The Commissioners on Uniform State Laws have endeavored not to introduce reforms in the law but to take settled

change the theory of the law in all of the jurisdictions where the common law prevails and would be doomed to failure from the start.

"Under the aggregate theory, the partners are joint owners of the partnership property, and joint obligors and obligees of claims due from or to the partnership, though some modifications of the ordinary rules of joint ownership may be necessary because of the particular character of partnership business."

Mr. Williston, in an able and lucid address to the Law Association of Philadelphia, from which this quotation is drawn, has shown the difficulty that would be met in the administration of a law based on any other theory, and, generally, how advantageous it is that the law of partnership should be codified in this country as it is in England.

The English Act was drawn by Sir Frederick Pollock. He began his work in 1879, and after examination, criticism, revision and change, the act passed the House of Lords in 1890 and came into operation on January 1, 1891. It codified the law of England without any attempt at improvement. In the United States where there have been divergent theories, improvement has been attained by embodying in the act those that have the weight of authority. The Uniform Act embodies the law of partnership in 43 sections. Attention may be called to some of the salient features of this act.

Dr. Lewis, in his review of the act, which appeared in the Legal Intelligencer (Philadelphia) on February 12, 1915, dwells on the practice under the act of April 8, 1873, now existing in Pennsylvania and which may be paralleled in other states. This act provides for a levy and execution by the sheriff upon the inconfusions are many. This practice will be repealed by the Uniform Act.

Since a partner's rights in the property are specified, and also his interest in the partnership, and his right to participate in the management, and the incidents of his ownership are defined, he being a "tenant in partnership," and his right is not assignable except in connection with the assignment of all the partners in the same property, it follows that his creditor has no right to levy on his interest in the partnership property. He may assign his interest in the partnership, for a partnership purpose, that is, only his share of the profits and surplus. This is made subject to the payment of any judgment secured by a separate creditor. (Sections 25, 26, 27.) When such a judgment has been obtained, the court may charge the interest of the partner with the payment of the unsatisfied amount of the judgment and appoint a receiver for his share of the profits, and make all other orders, directions and inquiries which the debtor partner might have made or which the circumstances of the case might require. Then it will not be necessary longer for the separate judgment creditor to institute two proceedings, as hitherto under Pennsylvania statute—a writ of execution and a bill in equity; nor will he need to sell his interest in the partnership before its value is ascertained, but he will ask the court which gave judgment to order the other partners to pay him the profits that would otherwise be paid to the debtor, or to make such further order as may seem just without unduly interfering with the rights of the remaining partners in partnership property. (See Section 28.)

Section 41 (1) provides:

"When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representatives, if the business is continued without liquidation, * * * creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business."

Section 17 makes a person admitted into a going business liable for all the debts of the partnership into which he is admitted, but his liability is confined to his interest in the partnership property. He is only liable in respect to his separate estate to those creditors who extended credit after his admission.

The courts have, in most cases, hitherto held the new partnership, formed as a result of the admission of the partner, has assumed the debts of the old partnership. Thus the new partner has become liable for these debts, not only to the extent of his contribution to the business, but unlimitedly.

Section 8 permits the acquisition of real property by the partnership in the partnership name, although the conveyance is without words of inheritance.

Section 10 gives any partner power to convey title to such property by a conveyance executed in the partnership name, but the partnership may recover such property unless the partner was authorized to make the conveyance.

Section 21 declares that every partner holds as trustee for the partnership any profits derived by him from any transaction connected with the partnership business, the law now being uncertain whether such claim is of the nature of a creditor's claim, or claim to the specific property or money. The act gives the partnership the right to claim as their own any property or money that can be traced.

Section 25 provides that a partner's right in specific partnership property is not subject to dower, courtesy or allowances to widows, heirs, or next of kin.

By Section 26 a partner's interest is defined to be personal property, thus removquestions pertaining to dissolution and winding up. There will be no longer any doubt that a partner may dissolve a partnership, although such dissolution is a violation of the partnership agreement.

Section 35 provides that only persons who have extended credit to the firm can hold a retiring partner on a contract made after he has retired, if they have not knowledge or notice of the dissolution. This makes the definition of knowledge and notice in Section 3 especially valuable. A clear line is drawn between knowledge and notice.

The present confusion of the law concerning the relative rights of the partner and of his separate creditors in the partnership property, and the rights of different classes of creditors, where successive partnerships containing one or more common members have continued the business, will be cleared up. The definition of partnership property as personal property will obviate the difficulties arising from the existing distinctions between real and personal property on the death of a partner. Questions pertaining to dissolution and winding up will be clarified and existing doubts removed, by the rule (Section 35) that a partner cannot after dissolution bind the partnership to third persons by any act which is not necessary to wind it up, or to complete unfinished transactions, unless such third person having had relations with the partnership by which credit was extended, has had no knowledge or notice of the dissolution, or having had such business relations, has no knowledge or notice of the dissolution, or the fact of such dissolution has not been duly advertised.

The need of uniform legislation of this character is apparent from the fact that many partnerships have members who are residents of different states, and the negotiation of contracts under uniform laws will be of undoubted advantage to the business aggregate theory. None of the commercial acts now so widely adopted, the Negotiable Instruments, the Warehouse Receipts, the Transfer of Stock, the Bills of Lading, or the Sales Act, has had a longer period of preliminary study.

While it cannot be claimed that the passage of this act will prevent litigation, it may confidently be claimed that it will reduce it to a minimum; that it will put in the hands of the legal profession and the community at large a simple exposition of the law.

We only hope that the example of Pennsylvania in enacting this law will be speedily followed in other jurisdictions.

WALTER GEORGE SMITH.

Philadelphia, Pa.

TRESPASS ON REAL ESTATE—VENUE

KROLL v. CHICAGO, B. & Q. R. CO.

Supreme Court of Nebraska. May 1, 1915.

152 N. W. 548.

(Syllabus by the Court.)

As a general rule, an action for injuries to real property situated in another state cannot be maintained in this state.

ROSE, J. Plaintiff brought this action in the district court for Holt county to recover $8,520 for injuries to real estate and personal property situated in Lawrence county, S. D. Defendant demurred to the petition on the ground that the court had no jurisdiction of the subject-matter of the suit. The demurrer was sustained. Plaintiff refused to plead further and elected to stand upon his petition. A dismissal of the action followed, and plaintiff has appealed.

The determining question is conceded to be: May an action for injury to real property situated in another state be maintained in this state? The courts of both England and America have generally answered this question in the negative. Practically the entire field of inquiry and discussion is covered by the opin-

203, Fed. Cas. No. 8411; Kentucky Coal Lands Co. v. Mineral Development Co. (C. C.) 191 Fed. 899. Many other cases are collected in 26 L. R. A. (N. S.) 933 et seq., in a note to Smith v. Southern R. Co., 136 Ky. 162, 123 S. W. 678. The reasons which have directed the course of adjudication generally on this subject are stated in the opinions in the cases cited. The question is not one of venue but of jurisdiction. The action is local and is maintainable only in the state or county wherein the land is situated. In a few cases a contrary view has been expressed; the most noteworthy being Little v. Chicago, St. P., M. & O. R. Co., 65 Minn. 48, 67 N. W. 846, 33 L. R. A. 423, 60 Am. St. Rep. 421. According to the great weight of authority, however, the correct rule is, generally, that an action for injuries to real property situated in another state cannot be maintained in this state.

To overturn the ruling on the demurrer, plaintiff cites Omaha & R. V. R. Co. v. Brown, 29 Neb. 492, 46 N. W. 39. That was an action to recover damages for the flooding of lands situated in Nebraska. It was held, under the statute, that the action was maintainable in any county where service upon the defendant could be obtained. The decision follows Genin v. Grier, 10 Ohio 209, a parallel case under the same statutory provisions. In both cases the cause of action accrued in the state in which the suit was brought. The ruling is not in conflict with the holding of the trial court in sustaining the demurrer in the present case. Notwithstanding the early Ohio case, the Supreme Court of that state in the later case of Pittsburgh, C., C. & St. L. R. Co. v. Jackson, 83 Ohio St. 13, 93 N. E. 260, 21 Ann. Cas. 1313, held:

"An action for trespass on lands situated in another state, or injury thereto, cannot be maintained in this state."

Genin v. Grier, 10 Ohio 209, and City of Fostoria v. Fox, 60 Ohio St. 340, 54 N. E. 370, were distinguished as follows:

"The cases cited, like all others, should be interpreted with reference to the facts of each case and the questions presented to and considered by the court. In those cases the question now before this court did not arise. In both cases the cause of action asserted accrued within the state, and the question of conflict of jurisdiction between the courts of this state and the courts of another state did not arise upon the record and was not considered by the

v. Jackson, 83 Ohio St. 13, 93 N. W. 260, 21 Ann. Cas. 1313.

For the same reasons Omaha & R. V. R. Co. v. Brown, 29 Neb. 492, 46 N. W. 39, on the subject of venue and jurisdiction, is distinguishable from the present case. The statute construed in the earlier case was amended in 1889 by inserting the following:

"All actions to recover damages for any trespass upon or any injury to real estate shall be brought only in the county where such real estate is situated." Laws 1889, c. 29.

Under the statute as thus amended, it was held in Dhooghe v. Chicago, R. I. & P. R. Co., 91 Neb. 613, 136 N. W. 1075, that an action to recover damages caused by the flooding of real estate must be brought in the county in which the land is situated. While the legislature in 1911 provided that, if the defendant in such an action is a railroad corporation, the suit may be brought where summons can be served, the change relates to the venue and not to the jurisdiction of the action. Laws 1911, c. 167.

It follows that the judgment of the trial court is right and is affirmed.

FAWCETT and HAMER, JJ., not sitting.

Note.—*Venue of Action for Tort Against Real Estate.*—The start of the rule in this country to which the instant case adheres was in the case of Livingston v. Jefferson, 1 Brock 203, Fed. Cas. 8, 411, in which two of our most eminent citizens were parties and which was decided in 1811 in a circuit court by Marshall, Circuit Judge, and Tyler, District Judge, who was the father of President Tyler. Mr. Wirt was attorney for the defendant, the winning side. The opinion was by Marshall, C. J. He referred for authority mainly to decisions of British courts made since the revolution. He said they were not authority but entitled to great respect, especially as it did not appear that any rule prior to that time had been overruled. Assuming then that such decision tells what the old rule was, he said: "According to the common law of England, then, the distinction taken by the defendant's counsel, between actions local and transitory, is the true distinction, and an action *quare clausum fregit*, is a local action." In answer to the contention that this distinction, viz.: "Actions are deemed transitory, where transactions on which they are founded, might have taken place anywhere; but are local where their cause is in its nature necessarily local," a rule at common law, "is impliedly changed by the act of the assembly which directs that a jury shall be summoned from the bystanders," he said he would not discuss such a statute, "because the jurisdiction of the courts of the United States depends, exclusively, on the Constitution of the United the total failure of justice, should a trespasser be declared to be only amenable to the court of that district in which the land lies, and in which he will never be found, appeared to me to be entitled to peculiar weight. But according to the course of the common law, the process of the court must be executed in order to give it the right to try the cause, and consequently the same weight of justice might appear. Other judges have felt the weight of this argument, and have struggled ineffectually against the distinction, which produces the inconvenience of a clear right without a remedy."

It is perceived here that Judge Marshall did not pretend to say what should be the rule in state courts and he would not consider any state statute from which an inference against the distinction might be drawn, because federal jurisdiction could not reach over the distinction.

In Ellenwood v. Marietta Chair Co., 158 U. S. 105, 39 L. ed. 913, trespass q. c. was held, in an original suit, not maintainable in a federal court for the "decisive reason," that: "By the law of England, and of those states of the union whose jurisprudence is based upon the common law, an action for trespass upon land * * * is a local action and can only be brought within the state in which the land lies." Here again there is nothing controlling but in respect to federal courts. There is cited the Livingston and other federal cases and also cases from New York, Massachusetts and Ohio.

In Smith v. Southern R. Co., 136 Ky. 162, 123 S. W. 678, 26 L. R. A. (N. S.) 927, the common law rule and distinction was recognized, but it was held not to apply to a case though a statute made such an action local, where an explosion in one state did injury to land in another state. It was said: "The entire happening, though beginning in Kentucky * * * and ending * * * in Tennessee was but one transaction, or a single accident, transpiring upon and on either side of an invisible line separating two states. Therefore it occurred in both at the same time and for that reason should be regarded as having occurred wholly in neither." But it is certain, that the only damage and the only trespass was in Tennessee. The Kentucky court felt the injustice of the rule and thought it ought to be distinguished away, if possible.

The distinction which Chief Justice Marshall approves as governing federal courts under the Constitution, and not necessarily state courts, has not been accepted by all the courts. Little v. R. Co., 65 Minn. 48, 67 N. W. 846, 33 L. R. A. 423, 60 Am. St. Rep. 421, attacks it very vigorously, saying: "It is somewhat surprising that the American courts have generally given more weight to English decisions on the subject rendered after the revolution than to those rendered before." It was claimed by this case that the question was not settled in England before this time, but Lord Mansfield, in 1774, in Mortyn v. Fabrigas, 1 Cowp. 161, 2 Smith Lead Cas., 9th Ed., 916, referred to two cases in which he had held that such an action would lie in England for injuries often resulting in a total denial of justice, and yet has considered himself bound to adhere to it under the doctrine of *stare decisis*."

In Hannibal & St. Joe R. Co. v. Mahoney, 42 Mo. 467, an action of trespass on land was brought in another country than where the land lay and it was held to be maintainable. It was said: "In all cases where the title is to be affected, obviously suits concerning the same must be commenced and tried in the county, where the land lies." But: "The primary object in trespass is to recover damages, not to try title to real estate." "The action of trespass is strictly personal, and may be brought anywhere, regardless of the place where the supposed injury happened." This case has been cited frequently by Missouri Supreme Court, on other points, with approval.

In Holmes v. Barclay, 4 La. Ann. 63, it was ruled that an action would lie in Louisiana for damage done by a steamer to real property in another state, though by the laws of said state the distinction above expressed was enforced.

Distinction Between Transitory and Local Action.—It is seen that the entire theory of venue being where the land, injury to which is being sued for, is based on the distinction above given. But there are many other definitions given. "Transitory actions are personal actions brought for the recovery of money or personal chattels, whether they sound in tort or contract." McLeod v. Conn. etc., R. Co., 58 Vt. 727, 6 Atl. 648. "They follow the party wherever he is to be found." McIntire v. McIntire, 16 D. C. 344, 350. "They have their foundation in the supposed violation of rights, which, in contemplation of law, have no locality and for which the right to compensation is recognized by the laws of all countries." McLeod v. R. Co., *supra.*

We may say in conclusion that Peyton v. Desmond, 129 Fed. 1, 63 C. C. A. 651, followed the ruling in 65 Minn., *supra,* upon the ground that the question was a local one. Van Devanter, C. J., quotes from Huntington v. Attrill, 146 U. S. 657, that: "Where actions to recover pecuniary damages for trespasses on real estate * * * are purely local or may be brought abroad, depends upon the question whether they are viewed as relating to real estate or only as affording a personal remedy. * * * And whether an action for trespass to land in one state can be brought in another state depends upon the view, which the latter state takes of the nature of the action."

When the place of origin of the action is spoken of as reflecting or fixing the nature of action, when the action itself is, wherever is its origin, merely a tort and determinable, by the general law of its origin as to its character, we think it erroneous to speak of any place as showing its nature. Its true nature is that it is a violation of right, the same where personal property is affected by a wrong as where real property is so affected. And to deny this, operates often in denying relief as against a wrongdoer. Why should law favor him? May he wantonly injure real estate and then move to another state and

REVIEW OF CURRENT PERIODICAL LITERATURE OF INTEREST TO LAWYERS.

(Edited by A. H. R.)

Constitutional Law. "Political Safeguards and Judicial Guaranties." By W. F. Dodd of the University of Illinois. 15 Columbia Law Review, p. 293 (April).

The author discusses the subject of proper safeguards for individual and property rights, and he groups these safeguards into two divisions, one political and the other judicial. Political safeguards he discusses under the headings: (1) Suffrage eliminations in which he calls attention to the greater power given to large tax payers. (2) Upper house controlling in the legislature, in which he calls attention to the great power of the Bundesrat in Germany, and the less important influence of the House of Lords in England. (3) Checks and balances, such as the requirement of the approval of the two houses and of the executive in matters of legislation. (4) The referendum, in which he strangely contends that the referendum is a conservative rather than a radical measure. (5) Safeguards of a purely political type, as the influence of aristocratic or leisure classes in the matters of leadership political and economic, and in the shaping of political issues.

Judicial guaranties are thus set up in constitutions and enforced by the courts. The author divides these guaranties into practically two classes: first, definite guaranties applicable to rights carefully defined; and second, guaranties of an individual character, such as provisions in our federal Constitution regarded as "due process of law," and "equal protection of the law."

The importance of the subject arises from the recent tendency for pure democracy and the political dominance of the non-property owning classes. The author quotes from Mr. W. S. McKechnie's work entitled, "The New Democracy and the Constitution," in which the author, speaking of English conditions says, "These classes not paying taxes, but receiving the benefits of taxation, will if in complete control operate the government in their own interests, and in the long run cripple or destroy the propertied classes—the more provident classes of the community. A safeguard of some sort is therefore desirable to protect property from a democratic government."

The author takes a peculiar view, however, with respect to the desirability of obstructing democratic control, saying, "In this discussion primary attention will be given to the safeguards which are compatible with the notion of democratic government. The whole tendency has been toward a democratic control, and such a control is in modern governments more, rather than less necessary, when government because of increasing activity is becoming more of an economic or social problem rather than a pure of the leisure class who, "pay rather more continuous attention to public affairs than the majority of the electors." The author gives the history of the Act of Parliament which took away the veto power of the House of Lords, showing that in the place of that check there has developed a much stronger opposition in the House of Commons itself with a tendency toward coalition ministries.

The author's discussion of judicial guaranties is a discussion of American decisions enforcing constitutional provisions. He reaches the conclusion that the courts have not been always wise in the enforcement of these guaranties as against strong public sentiment, which has reacted against the court itself and the right of the judiciary to declare legislation unconstitutional. The author commends Mr. Justice Holmes' now famous declaration in the Haskell case to the effect that the "police power extends to all the great public needs," and further, that "It may be put forth in aid of what has been sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

Courts. "Justice for the Small Man—A Modern Municipal Court in Operation." By David Baer. The Century Magazine, p. 144, May, 1915).

The author discusses the municipal court of the District of Columbia, and its operation, showing that the municipal court has solved the problem of the small man's litigation, and has become the poor man's court. He shows the defects of the former justice practice to be not only the incompetence of the justice, but his "pronounced tendency" to always give the judgment for the plaintiff, on the ground that the justice who gave the most favorable decisions to the plaintiff would naturally get the most business for himself and his constable. The author quotes one eminent justice of the peace who declared that "In these days J. P. means 'Judgment for the Plaintiff,' unless some providential interference could be procured to prevent it."

The author declares that the cost in the municipal court of the District of Columbia rarely exceeds $2.25 in each case. He calls attention to the provision on the law which permits the plaintiff to make affidavit to the truth of his complaint, and thereby compel defendant to answer by sworn statement of defense. Failure to make affidavit to matters of defense will result in immediate judgment for the plaintiff. The most remarkable fact exposed by the author's statistics is that of 92,736 cases which were tried during the period running from March, 1909, to January, 1913, only 448 were appealed. The author says, "Probably no stronger evidence than the value of such a court, and the respect shown for its decisions, can be found in this trivial proportion of cases which are carried to a higher tribunal, in this instance [illegible] cent." The judges of [illegible] average to each case, resulting in the fact that more than 25,000 cases a year are handled by five judges of this court, and the dockets are never a day old.

The cost of suit, regardless of the character or amount of the claim, is $1.60, with an additional fee of 50 cents if the case comes to trial. Cost for judgment, bonds, etc., are on a similar scale, yet despite the negligible sum required, the municipal court, for the fiscal year ending June 30, 1913, showed a profit of more than $12,000 over and above all expenses. The fact that the judges are appointed by the President of the United States may have much to do with the character and ability of this particular court, without doubt, making it the model of its kind in this country.

Criminal Evidence. "Nemo Tenetur Prodere Seipsum." By A. Leo Everett of New York. 9 Bench and Bar, p. 530 (April).

The author discusses the history of the constitutional privilege against self-incrimination. He takes a favorable view of this privilege and attacks Prof. Wigmore's statement that the interests of the public require a substantial modification of the doctrine. The author has given a very learned review of the practice in England, discussing the subject with reference to the inquisition and the Star Chamber, out of which period and the practices of which period, the demand for this privilege arose. He opposes certain proposed restrictions from this right offered to the New York Constitutional Convention, which shows wherein each one of them would be detrimental. (1) Elimination of the privilege from the Constitution, so that it shall be dealt with, as policy may require, by statute. (2) That inferences may be drawn by the jury from the failure of the defendant in a criminal case to testify in his own behalf. (3) That a witness shall not, in a cause or proceeding in which he is not on trial for crime, be excused from testifying on the ground that his testimony may incriminate him, but that the testimony so obtained shall not be read against him at his own trial. (4) That there should be a complete abolition of the privilege in connection with persons holding public office.

Another proposition made to the New York Constitutional Convention was that power should be conferred on the courts to compel protection of documents by the accused. The author does not favor this proposition, and quotes with approval the Boyd case, 116 U. S. 616, that the tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanc-

vard Law School. 13 Michigan Law Review, p. 355 (March).

The author's liberal position on the rules of evidence is well known, and in this article, which is practically his address delivered before the Rhode Island Bar Association last December, he states at length the criticism that has been made of courts of this country in their strict application of evidentiary rules. While the author justifies much of the criticism that has been made by the courts' attitude on matters of evidence, he shows that this criticism has often gone to the extent of urging that all rules or privileges which shut out the truth should be cleared away and the light let in from every angle. The author thinks that the profession and the courts pay too little attention to the criticism of laymen and of the press, forgetting that it is the people's business and not the lawyers' that is being transacted. He thinks that both the people and the lawyers are wrong—that there is a middle course—saying, "The matter cannot be at a proper focus until the law of evidence is seen as the thing it is—a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system, as the outcome of a quantity of rulings by sagacious lawyers, where ordinary untrained citizens are acting as judges of fact."

The author discusses the hearsay rule as being the rule of evidence most subject to objection, and suggests that the number of exceptions made to it is clear proof that it does not rest altogether upon a sound basis. The author's main conclusion is not that the hearsay rule, character rule and other rules of exclusion should be abrogated, but that their application should be left largely to the discretion of the trial court. In other words, the rules of evidence should not be the rule of right but of administration. The author says, "Sometimes, no doubt, real rights of the parties are concerned, as in the case of professional privilege. But for the most part it is only procedure; and simplicity and flexibility, important enough in any question of procedure, become doubly important in a matter so delicate and varied as the guidance of a trial before an untrained tribunal." The author calls attention to the inroads made on the hearsay rule by certain statutes, calling attention to a statute in Massachusetts that a declaration by a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.

Homicide. The Law of Dying Declarations. By A. A. Hoehling, Jr., of Georgetown University. 3 Georgetown Law Journal, p. 8 (March).

that the dying speak the truth, and that the conscious knowledge of immediately impending death creates a situation of equal solemnity and probity with that produced by a sworn statement in court, it would seem obvious that such declarations should be equally convincing in both civil and criminal cases; but the doctrine has long since become firmly established that the use of dying declarations is limited as above explained."

International Law. "The International Status of the Grand Duchy of Luxemburg and the Kingdom of Belgium in Relation to the Present European War." By Theodore P. Ion, of New York. 13 Michigan Review, p. 368 (March).

In this article the author discusses the treaties guaranteeing the neutrality of Belgium and Luxemburg. He argues that these treaties, far from being "mere scraps of paper," are absolutely binding upon the Powers who bound themselves to such guaranties. The author sets forth the arguments of German and England publicists with respect to the meaning of the guaranties of neutrality in the treaties of 1839 and 1867, respectively, guaranteeing neutrality to Belgium and Luxemburg. These treaties are set forth and discussed in each of their provisions in relation to events that have occurred since the signing of the treaties, many of which are urged by German apologists as to have released the signatory powers from the guaranty of neutrality.

International Law. "The Transfer of Merchant Vessels from Belligerent to Neutral Flags." By James W. Garner, of the University of Illinois. 49 American Law Review, p. 321 (May-June).

This is a subject that has attracted the attention of law writers generally. It is a subject quite difficult of any solution, as the present war has created several unusual situations. The author discusses the Dacia case very thoroughly and cites a number of cases during the Civil War and Spanish-American War.

Juries. "Some Needed Reforms in the Methods of Selecting Juries." By Willis B. Perkins, of Grand Rapids, Mich. 13 Michigan Law Review, p. 391 (March).

The author discusses "the protracted and rambling interrogatories directed to the members of the jury panel, on their voir dire, which have come to be a regular feature of nearly every important trial in this country." In contradistinction to this slipshod practice, the author calls attention to the English practice permitting inquiries in a criminal case on only two points: first, whether the juror is in any way related to the accused or his victim; second, whether he knows of any reason why he tion of jurors on their voir dire is absolutely unknown in England, while many lawyers who have been in practice for twenty years or more have never known a juror to be objected to or excused for cause. It not infrequently happens that the same twelve men will hear three cases without leaving the box. The author, after a discussion of present conditions in England and America, offers the following six suggestions:

1. The securing of the jury should be under the guidance and control of the trial judge, and his judgment and rulings should be final and conclusive, except in a case of a clear abuse of discretion affecting the merits of the controversy.

2. The examination of a proposed juror should be confined to the essential questions relating to his qualifications, namely, as to whether he is related to either of the parties, and as to whether he can return a fair and impartial verdict on the evidence.

3. The fact that a juror has casually formed or expressed an opinion which will require evidence to remove, ought not, prima facie, to be held a disqualification.

4. The best known methods of securing jury lists should be adopted so as to insure, as far as possible, the selection of the best material obtainable for jury service, and the elimination from that service of the so-called professional talesman.

5. The number of peremptory challenges should be materially reduced.

6. Adequate provision should be made for the comfort and accommodation of the jurors while engaged in the performance of their duty.

Neutrality. "The Origin and Growth of the Law of Neutrality." By Hannis Taylor, of Georgetown University. 3 Georgetown Law Journal, p. 1 (March).

In this article our former ambassador to Spain traces the conception of neutrality from the earliest times down to the present, giving special attention to the definition of the term in the Greek law of nations. The author gives Jefferson considerable credit for the development of the idea, saying, "Jefferson's policy of neutrality was a rich fertilizer spread upon the growing crop of American clipper ships." From Jefferson's administration to the present time, the author notes large development of the idea, especially in the right of neutral ships to trade with the nations at war.

Patents. "Reduction to Practice of Patentable Inventions." By William Macomber, of Buffalo, N. Y. 63 University of Pennsylvania Law Review, p. 353 (March).

The author discusses the question, "Who is the first and original inventor of a patentable [illegible] idea is that description of it sufficient for one to take such disclosures and embody the mental act in concrete form, he may then rest calmly at least a full two years, which he supposes the statute gives him, before filing his patent application." The author says, though, that however brilliant the discovery of a new principle may be, it is not patentable until the principle has been applied to some practical purpose. In other words, it is not the man who discovers the new principle, but the man who first reduces it to some practical form, who is entitled to a patent. From an exhaustive review of cases the author draws the following conclusion. "First, constructive reduction to practice by filing an allowable patent application has been given a position of importance heretofore undefined, because this exact condition had never before been presented to the courts. Second, that this ruling is of final control where it fits the facts; but that there are obviously numerous conditions to which it could not be applied except by material modification. Third, it teaches inventors and attorneys alike that diligence in reduction to practice, either by actual construction or by filing an allowable patent application, grows in importance with the increase of inventive genius and intensity of industrial struggle."

Prizes. "Prize Cases in the English Courts Arising Out of the Present War." By Russell T. Mount, of New York City. 15 Columbia Law Review, p. 316 (April).

This article discusses the principles involved in decisions in Prize Courts in the English Courts which have arisen out of the present European war. He discusses the organization and administration of prize law under Section 4 of the Supreme Court of Judicature Act. It discusses the following cases: The Chile (1914) Probate Division 212; The Marie Glaeser (1914) Probate Division 218; The Tommi and The Rothersand (1914) Probate Division 251, and The Roumanian (1915) Probate Division 26. Each of these cases is exhaustively quoted and discussed, and the changes which have been made in international law are set forth.

Roman Law. "The Value and Place of Roman Law in the Technical Curriculum." By Chas. S. Lobingier, of Shanghai, China. 49 American Law Review, p. 349 (May-June).

The author's argument is to the effect that the Roman law is the source of elementary juridical conception as well as of specific doctrines now found in every legal system of the civilized world, that it is a mine of legal terminology and the model for studying legal development, that it follows naturally the student's under-graduate work in the classical courses of our universities, and should be properly an introduction to the study of law. The author criticises the present unphilosophical and unscientific methods of the study of

University of Pennsylvania Law Review, p. 380 (March).

The author continues his discussion, which we have reviewed in two previous numbers, of the history of the rule making authority in England. He calls attention to the fact that the old Rules of 1875 amounted to less than six hundred in number, but that the new Rules under the Revision Act of 1883 number eleven hundred, but he says that the fear that such an increase was oppressive was soon dispelled when it was discovered that nearly four hundred of the Rules were transcriptions from previous statutes and regulations so that there had been completed a true code of procedure. Of these Rules three hundred and sixty-seven constitute a distinctively new element in procedure and are the ones that contain the most interest. Characteristic of the new Rules is a complete set of forms for every action. Some critics, the author declares, have stated that the effect of these is to return to a system very much like that in use in the common law procedure act. He says that this is not true, as the forms are very simple and could easily be understood by anyone, and it is further provided in the Rules that the pleadings must be as concise as possible, and that the parties may, if they choose or must, at a Master's order, dispense with pleadings altogether. Two other important innovations are involved in the Rule, "No technical objection shall be raised to any pleading on the ground of want of form," and the Rule abolishing demurrer. The author says that the bar is very glad to get rid of the demurrer, as its use was never beneficial and only afforded the parties the satisfaction of delaying cases or annoying the other parties. In place of the demurrer the pleader is privileged to raise an objection on a point of law, which is disposed of at the trial or after the trial. The author quotes a complaint of Lord Davey to the effect that, "Nowadays the pleader need not stop to think whether his cause of action or defense will hold water or not, and anything which is not obviously frivolous or vexatious will do by way of pleading for the purpose of trial and for getting the opposite party into the box." The author, however, calls attention to the fact that no case goes to trial in the court and consumes the time of the court until it is a bona fide case and ready for trial on the day it is set. For this purpose the case must first go to a Master, who has complete charge of the proceedings up to trial, and his preliminary decisions "clear the air of many matters that might cloud the issues when they come to trial." "His presence," the author says, "is the visible symbol of the control over the course of an action, now lost to the parties themselves, which is exercised by the court."

Passing over a number of other interesting innovations mentioned by the author, we notice one which will not fail to arouse the interest of American lawyers. Order XXV in Rule

This rule is limited to cases where the plaintiff has a cause of action, the court awarding asserting his right without awarding damages. This is an action against one member alone of a numerous class, for the infringement of a right they are all violating, and a declaration is asked for that the right exists as against them all.

Without going further into the various changes in the Rules of English practice, we note that the author remarks upon the eager activity of some lawyers to secure a change in the Rules, and the bitter opposition of other lawyers that the Rules shall be left as they are. The decision, however, of whether there shall be a change in the Rules rests with the Rule Committee, the constitution of which we called attention to in our last review. The elasticity of this system is shown in the fact that when a Rule is shown to be obscure or incomplete the Rule Committee immediately amends it. It appears from the author's discussion that the key to the present English system is the Master, whose control over the case is almost complete. He can force the parties to give him such information as will enable him to make preliminary orders which he thinks are necessary to aid the court or the jury in the hearing of the case. All preliminary motions and orders, which in this country take so much time of our courts, are threshed out in courts before a Master to whom the case is assigned.

ITEMS OF PROFESSIONAL INTEREST

THE CONVENTION OF THE MISSISSIPPI BAR ASSOCIATION.

The Mississippi Bar Association held a very successful meeting May 4, 5 and 6, at the Elk's Club in Vicksburg. All of the Justices of the Supreme Court were present, and a large representative delegation of lawyers from all parts of the state.

The welcome address was made by Hon. Jos. Hirsch, President of the Vicksburg Bar Association. Chief Justice Sydney Smith, President of the Association, called the Association to order and delivered the annual address, the subject of which was "A Plea for the Establishment in Mississippi of a Modern Unified Court." Hon. Thos. W. Shelton, of Norfolk, Va., delivered an address on the subject of "Some Observations of the Conflict Between Moral and Jural Law."

When the name of John Allen was called, a being able to be present at this meeting, due to his illness, this being the first meeting of the Mississippi Bar Association that Mr. Allen has missed.

After selecting the city of Laurel as the next meeting place of the Association, the convention adjourned, after electing the following officers: President, R. B. Campbell, of Greenville; Vice-President, Judge R. A. Reed, of Natchez; Secretary and Treasurer, James R. McDowell, of Jackson; Executive Committeemen, R. L. McLaurin, Vicksburg; C. S. Street, Laurel; T. F. Paine, Aberdeen.

HUMOR OF THE LAW

"Is it true that both your husband and the man who lives next door to you have failed in business?" "Yes, but Ned's failure isn't nearly so bad as Mr. Naybor's. He failed for fifty cents on the dollar, while my husband failed for only ten cents on the dollar."—Boston Transcript.

Russell Duane, the lawyer, is authority for the statement that a successful jury lawyer will talk up, not down, to the twelve men in whose hands his client's fate rests. Juries like to draw their own conclusions from the facts, and they hate to be patronized or insulted. "A little circumstance that happened in a Philadelphia common pleas court illustrates this," says Mr. Duane. "A lawyer was defending a suit for damages for personal injury. His defense was contributory negligence, based upon drunkenness, but he cautioned his witnesses to scrupulously avoid testifying that the plaintiff was drunk. 'How did he act?' a witness was asked. 'Oh,' was the response, 'he acted awfully funny, I thought. He lurched from side to side, swayed, staggered, and his head kept bobbing forward and backward, at this point the foreman of the jury was seen to lean over to the juror seated next to him and whisper hoarsely, 'Why, that man was drunk.' The jurors all thinking so, too, were quite tickled over their own acumen in drawing an inference of facts. On the other hand, if the lawyer's witnesses had testified that the plaintiff was drunk, it would have immediately thrown the jury into a belligerent mood. Jurors usually

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort, and all the Federal Courts.

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1. **Accord and Satisfaction**—Condition. — A creditor receiving and collecting a check sent by his debtor on condition that it shall be in full payment for a disputed account is bound thereby.—Rosser v. Bynum & Snipes, N. C., 84 S. E. 393.

2. **Acknowledgment**—Certificate of.—A certificate of acknowledgment, reciting that the acknowledger was personally known to the officer, but omitting the statutory words "the within named bargainor," held sufficient.—Williamham v. Potter, Tenn., 173 S. W. 434.

3. **Adoption**—Statutory.—Under Statute of Adoption, §§ 6, 7, the estate of a child designated in a will as "my adopted daughter" descended, except the part that went to the child's husband, to testatrix's heirs, rather than to the child's natural parents.—Warner v. King, Ill., 107 N. E. 837.

4. **Adverse Possession**—Color of Title.—Acts of ownership by a purchaser of unimproved timber lands at a sale, at least judicial in form, held to constitute such possession under color of title as to give him title by adverse possession.—Sheffey v. Davis Colliery Co., U. S. C. C. A., 219 Fed. 465.

5. **Appearance**—Waiver. — Where defendant answered on the merits after denial of his mo-

7. **Bankruptcy** — Confession of Judgment.—Where an insolvent owning mortgaged real estate confessed a judgment to a preferred creditor and permitted a sale under foreclosure subject to the judgment, there was a sale of property affected by the preference.—In re Fisher, U. S. D. C., 219 Fed. 638.

8.——Courts.—A state court cannot, after the petition but before adjudication, order the foreclosure of a valid mortgage against part of the bankrupt's property which was in his possession at the time of the petition.—Pugh v. Loisel, U. S. C. C. A., 219 Fed. 417.

9.——Identification of Property. — Where bankrupt stock-brokers possessed less stock than they had purchased for customers and the stock so possessed could not be identified, apportionment thereof between the customers held unauthorized.—In re Hollins, U. S. C. C. A., 219 Fed. 544.

10.——Lien.—Where the garnishee admitted having defendant's money in its hands, it could not complain of the court's ruling that the garnisheeing creditor's lien was superior to any rights of the trustee in bankruptcy of defendant.—Citizens' Nat. Bank v. Dasher, Ga., 84 S. E. 482.

11.——Preferences.—Where a chattel mortgage was attacked as a voidable preference, it was no answer to show that it was otherwise valid whether on or off the record, whether against third parties or between the original parties thereto.—Williams v. German-American Trust Co., U. S. C. C. A., 219 Fed. 507.

12.——Trade Fixtures.—Where at the time of bankruptcy the bankrupt was in possession of real property under leases which had more than 10 years to run, trade fixtures held real property and subject to judgments recovered against it more than four months before bankruptcy.—In re J. L. Kesner Co., U. S. C. C. A., 219 Fed. 512.

13.——Trustee.—A stockholder and officer of a bankrupt corporation is not, ipso facto, incompetent to act as its trustee in bankruptcy.—In re Merritt Const. Co., U. S. C. C. A., 219 Fed. 555.

14. **Banks and Banking**—Deposit.—A joint ownership, with the incident of survivorship attaching as a matter of law, may be created in a bank deposit by agreement between donor and donee.—Kennedy v. Kennedy, Cal., 146 Pac. 647.

15. **Beneficial Associations**—By-Laws.—A by-law requiring that a member appeal to a designated tribunal to obtain an adjudication of his right to sick benefits held not to apply to the right of beneficiaries to sue to collect funeral benefits.—Grubbs v. Comanche Tribe No. 6, I. O. R. M., Ga., 84 S. E. 494.

17.——Extension.—Time to which payment of note is extended must be definite, and payee's agreement that notes might be extended until makers were able to pay, and that he would not crowd them, was not a valid extension.—Lanum v. Harrington, Ill., 107 N. E. 826.

18.——Indorsement.—A third party's indorsement of draft drawn by defendant, payable to plaintiff bank, held presumed to have been a part of the original transaction.—Harper v. Winfield State Bank, Tex., 173 S. W. 627.

19. **Boundaries**—Courses and Distances.—Courses which ran the lines outside of lands owned by the grantor held controlled by the presumption that the grantor intended to convey only his own land.—McDowell v. Carothers, Ore., 146 Pac. 800.

20.——Field Notes.—A patentee's field notes, calling for course and distance and for the western boundary of a section as the eastern boundary, held to make the call for the boundary prevail over calls for course and distance.—Braumiller v. Burke, Tex., 173 S. W. 609.

21. **Carriers of Goods**—Freight Charges.—Where a carrier took plaintiff's goods beyond their destination, plaintiff was not required to pay freight charges beyond point to which he had directed their shipment.—Wichman v. Atlantic Coast Line R. Co., S. C., 84 S. E. 420.

22.——Interstate Commerce.—As regards local switching, having no connection with interstate commerce, performance of a carrier's contract is not prevented by Interstate Commerce Act, fixing a higher switching charge.—Peoria & P. U. Ry. Co. v. Corning & Co., Ill., 107 N. E. 889.

23.——Overcharge.—That an interstate carrier was guilty of imposing a reconsignment charge on hay shipped from a certain point held insufficient to entitle a shipper at that point to recover the charge as damages, in the absence of proof that it actually suffered damage.—Lehigh Valley Railroad Co. v. American Hay Co., U. S. C. C. A., 219 Fed. 539.

24. **Carriers of Live Stock**—Injuries.—The action being for injuries to stock awaiting shipment, it was not error to exclude tariffs and classifications of the road on file with the Interstate Commerce Commission from evidence, where defendant railroad denied delivery of stock to it.—Reading v. Chicago, B. & Q. R. Co., Mo., 173 S. W. 451.

25. **Carriers of Passengers** — Contributory Negligence.—A street car passenger going to the rear platform, preparing to alight, on the car coming to a stop at his designation, is not guilty of contributory negligence, as a matter of law.—South Covington & C. St. Ry. Co. v. Trowbridge, Ky., 173 S. W. 371.

26. **Champerty and Maintenance**—Casualty Insurance.—A stipulation in a casualty insurance contract binding insurer to defend suits and advances as an innocent lien-holder.—Frith v. Wright, Tex., 173 S. W. 453.

28. **Commerce**—Intoxicating Liquors.—Where unlawful sale of intoxicating liquor in local option territory was completed, either before or after its delivery to an interstate carrier, there was no question of interference with interstate commerce.—Frogg v. Commonwealth, Ky., 173 S. W. 383.

29. **Constitutional Law** — Administrative Board.—Hurd's Rev. St. 1913, c. 114, § 50, is not invalid as permitting the public utilities commission to assume functions of the executive, judicial, and legislative departments of the state; Public Utilities Act, §§ 68 and 69, providing for appeals to the circuit and Supreme Courts.—State Public Utilities Commission v. Toledo, St. L. & W. R. Co., Ill., 107 N. E. 774.

30.——Due Process of Law.—Laws 1913, p. 272, authorizing drainage districts to connect their ditches, satisfies due process of law clause of Const. art. 2, § 2, by providing for notice to the district as a corporation.—Drainage Com'rs of North Fork Special Drainage Dist. v. Commissioners of Rector Special Drainage Dist., Ill., 107 N. E. 895.

31.——Juvenile Delinquency.—Detention under juvenile delinquent act without a warrant held not without due process of law.—Weber v. Doust, Wash., 146 Pac. 623.

32.——Regulation of Sales.—Laws 1909, p. 705 (Rem. & Bal. Code, § 6011 et seq.), regulating the sale of concentrated feeding stuff and excepting in section 13 flour mills, held to violate Const art. 1, § 12, because granting special privileges.—State v. W. W. Robinson Co., Wash., 146 Pac. 628.

33.——Segregation of Races.—A city ordinance prohibiting white persons and colored persons from residing in the same block held violative of the due process of law clauses of Const. art. 1, § 1, pars. 2 and 3, and Const. U. S. Amend. 14.—Carey v. City of Atlanta, Ga., 84 S. E. 456.

34.——Special Privileges.—Gen. Code, § 6072, authorizing tax on liquor traffic to be assessed against leased premises, where illegal sales have been made, held violative of Const. Bill of Rights, § 2, prohibiting special privileges and immunities.—Evans v. Mannix, Ohio, 107 N. E. 763.

35.——Taxation.—That an election was held in 1907, on the question of taxation for school purposes within the "school limits" extended by Acts 1900, p. 225, § 19, and the mayor and council were preparing to levy the tax for 1914, did not estop citizens and taxpayers from enjoining the collection of such tax.—James v. City of Blakely, Ga., 84 S. E. 431.

36. **Contracts**—Benefit of Third Person.—To support suit by person for whose benefit contract is made, promisee must owe him some obligation or duty when the contract is made, and it is not sufficient that he would be benefited by performance.—Fidelity & Casualty Co. of New York v. Martin, Ky., 173 S. W. 307.

37.——Implied Contract.—Where the builder of a ship under contract voluntarily made alterations after delivery in recognition of its obligation under the original contract, the law will not imply a contract on the part of the purchaser to pay for the same.—Fore River

39. **Corporations** — Dissolution.—The courts of the forum have no authority to dissolve or wind-up a foreign corporation; their powers being limited to taking charge of the property within the jurisdiction for local creditors.—Dickey v. Southwestern Surety Ins. Co., Ark., 173 S. W. 398.

40.——Exchange of Stock.—A stockholder exchanging his stock for stock in another corporation may not rescind and recover back the stock given, or its value, without returning the stock received or accounting for its value.—Continental Trust Co. v. Cowart, Tex., 173 S. W. 588.

41.——Rescission.—One induced by fraud to purchase corporate stock may rescind the contract and recover money paid on returning the consideration, or he may affirm the purchase, retain the stock, and sue for the damages.—Goodwin v. Dick, Mass., 107 N. E. 925.

42.——Usury.—Where a corporation had no power to loan money, a contract by which it purchased certain piano leases, which was in fact a cover for a usurious loan, to the bankrupt, held void.—In re Grand Union Co., U. S. C. C. A., 219 Fed. 353.

43. **Creditors' Suit**—Attorney Fees.—Where the fund from sale of exempt property which creditors procure to be paid into court is more than sufficient to pay all debts where exemptions were waived, and costs, the excess going to the bankrupt should not be reduced by attorneys' fees for bringing the fund into court.—Peppers v. Cauthen, Ga., 84 S. E. 477.

44. **Damages**—Excessive.—An award of $5,000 in favor of a common Mexican laborer, whose foot was crushed under the wheels of a car, so that the major portion had to be amputated, and he could only walk on the heel, is not excessive.—San Antonio, U. & G. R. Co. v. Moya, Tex., 173 S. W. 608.

45.——Stipulated.—Where stipulated sum for breach of contract has reference to uncertain damages, and serious damage might have been incurred, and no fraud has been used, the stipulated sum furnishes the measure of damages, and the courts cannot interfere.—Parker-Washington Co. v. City of Chicago, Ill., 107 N. E. 872.

46. **Deeds**—Map.—Where a conveyance of lots is made with reference to a map, it is immaterial who made the map or whether it is recorded or whether a copy can be produced, if the location can be proven with reference to streets, etc., by any method recognized by law.—Spencer v. Levy, Tex., 173 S. W. 550.

47. **Descent and Distribution** — Children.—Children of a marriage between a man having a living wife, not divorced, and a single woman are legitimate, and entitled to inherit his estate under Kirby's Dig. § 2640.—Cooper v. McCoy, Ark., 173 S. W. 412.

48. **Divorce**—Conduct of Wife.—Divorce to husband held warranted, where wife took pleasure in the society of men writing her improper letters, and made no effort to cause the correspondence to cease.—Glenn v. Glenn, Wash., 146 Pac. 619.

49. **Dower**—Inchoate Rights.—Where a wife is not joined in suits to foreclose mortgages on her husband's lands, decrees of foreclosure do not affect her inchoate right of dower subject to incumbrances existing when the husband acquired title.—Bigoness v. Hibbard, Ill., 107 N. E. 813.

50. **Drains**—Damages.—A statute, requiring the drainage of swamp lands within particular localities at the expense of the owners thereof that persons traveling on streets will not be endangered, but owes no absolute duty to employ the safe-guards "best known and most extensively used."—Americus Gas & Electric Co. v. Coleman, Ga., 84 S. E. 493.

53. **Eminent Domain**—Elements of Damages.—In determining whether land is damaged by the operation of an elevated railroad in front of it, every element, which in an appreciable degree enters into the diminution or increase of value, must be considered.—Geohegan v. Union Elevated R. Co., Ill., 107 N. E. 786.

54.——Riparian Owners.—A riparian owner is entitled to damages for the taking for public use of his rights to the natural and accustomed flow of the water in its usual channel.—State v. Superior Court of Cowlitz County, Wash., 146 Pac. 609.

55. **Estoppel**—Acquiescence. — A corporation which owned practically all of the stock of another corporation against which a foreclosure suit was brought, and also some of the bonds, although not a formal party, held estopped, by acquiescence in the decree of sale, to afterward assert a claim under a contract to property embraced in such decree.—State Bank of Chicago v. Idaho-Oregon Light & Power Co., U. S. D. C., 219 Fed. 594.

56.——Adverse Possession.—One who, as trustee of a lodge, executed a deed to certain lots, is estopped from claiming a portion thereof against the grantee by adverse possession for any period prior to the execution of the deed.—Crump v. Sanders, Tex., 173 S. W. 559.

57.——Admissions.—An admission by counsel for defendant in a colloquy with the court that the defense to an action at law is purely equitable is prima facie at least an abandonment of reliance upon a general denial.—Coe & Stedman Realty Co. v. Coryell, Colo., 146 Pac. 791.

58. **Executors and Administrators**—Collateral Attack.—An order by the court of ordinary, reciting that an administratrix had applied for leave to sell land, held amissible in a collateral proceeding, over objection that it did not sufficiently describe the land.—Davis v. Harden, Ga., 84 S. E. 426.

59. **Explosives** — Proximate Cause.—Defendant's negligence per se, in keeping dynamite contrary to ordinance, was a concurrent proximate cause of injury from explosion, regardless of negligence or intent.—Houston, E. & W. T. Ry. Co. v. Cavanaugh, Tex., 173 S. W. 619.

60. **Frauds, Statute of** — Improvements.—Where change of possession and improvements on land are set up by a purchaser to take a parol contract for its purchase out of the statute of frauds, the value of the improvements must be substantial and must exceed the value of the use of the property.—Page v. Vaughan, Tex., 173 S. W. 541.

61. **Gas**—Public Utilities.—State public utilities commission held not authorized to require pipe line corporation to extend its line to new gas fields so as to constantly furnish an adequate supply of gas.—Fidelity Title & Trust Co. v. Kansas Natural Gas Co., U. S. D. C., 219 Fed. 614.

62. **Homestead**—Equitable Title.—In the absence of evidence that plaintiff had made valuable improvements or resided on land under a parol contract for its purchase, he was not vested with a legal or equitable title to sustain a claim to homestead.—Page v. Vaughan, Tex., 173 S. W. 541.

63. **Homicide**—Conviction of Lower Grade.—A judgment of conviction of manslaughter will not

it liable for the death of the patient from smallpox.—Jones v. Sisters of Charity of the Incarnate Word, Tex., 173 S. W. 639.

66. **Husband and Wife**—Community Property.—Where a father at the death of his wife conveyed real estate to his children in settlement of their interest in community property, and they on attaining majority, ratified the conveyance, they had no interest in community property.—Word v. Colley, Tex., 173 S. W. 629.

67. **Indemnity**—Contract.—A provision of a contract between a railroad company and a lumber company granting trackage privileges held not an assumption by the lumber company of liability caused by negligence of the railroad company to persons operating the lumber company's trains.—Massee & Felton Lumber Co. v. Georgia & F. Ry. Co., Ga., 84 S. E. 468.

68. **Injunction**—Oil Lease.—Stockholders of an oil company could not enjoin the cancellation of an oil lease because wells driven by virtue of the lease produced a paying quantity of oil, where the lease provided for a greater quantity.—McLean v. Kishi, Tex., 173 S. W. 502.

69. **Insurance**—Indemnity Company.—Under policy, indemnifying against loss for personal injuries, insurer held not liable where no part of judgment had been paid, and, not being liable, there was nothing for the judgment creditor to attach, though insurer defended the action against insured.—Fidelity & Casualty Co. of New York v. Martin, Ky., 173 S. W. 307.

70.——Unearned Premium.—Where insured took credit for the unearned premium as of the day that he surrendered his policy, he thereby waived for a sufficient consideration his right to five days' notice of cancellation, and could not recover though loss occurred during the five days.—Kelley v. Aetna Ins. Co., W. Va., 84 S. E. 502.

71.——Waiver. — Benefit insurance society charge with notice of breach of warranty, which, instead of declaring the contract void, collected and retained assessments, held to have waived the breach, notwithstanding provisions of its laws as to waiver.—Sovereign Camp of Woodmen of the World v. Latham, Ind., 107 N. E. 749.

72. **Judicial Sales**—Caveat Emptor. — The maxim of caveat emptor applies strictly to judicial sales, and the buyer must, at his peril, see that the officer selling as agent of the court does not exceed his authority.—Union Trading Co. v. Drach, Colo., 146 Pac. 767.

73. **Landlord and Tenant**—Burden of Proof.—A purchaser of a tenant, when sued by the landlord for the value of the crop, has the burden of proving that the landlord waived his lien for rent and advances.—Adams v. A. A. Paton & Co., Tex., 173 S. W. 546.

74. **Libel and Slander**—Injury to Profession or Trade.—An oral statement that jurors knowingly returned a wrong verdict does not impute unfitness to perform the duties of an office, employment, profession, or trade, so as to be slanderous per se.—Smallwood v. York, Ky., 173 S. W. 380.

75. **Limitation of Actions**—Amendment of Pleading.—Where an action for tort was commenced before the action was barred, limitation could not be urged to an amendment stating results of injury more fully, filed when statute would bar suit then brought.—Houston Chronicle Pub. Co. v. McDavid, Tex., 173 S. W. 467.

76. **Lis Pendens**—Notice.—A bill for separate maintenance, which does not claim a particular tract of land, is not notice of a claim which affects a subsequent grantee.—American Woolen Co. v. Lesher, Ill., 107 N. E. 882.

77. **Mandamus**—Pleading.—Where mandamus to properly maintain its lighting system in its freight yards.—Kirbo v. Southern Ry. Co., Ga., 84 S. E. 491.

79.——Fellow Servant.—No recovery can be had for the death of servant caused by fellow servant's negligence, where the complaint, which relied on the common law, did not aver the fellow servant's negligence.—Chicago & E. R. Co. v. Mitchell, Ind., 107 N. E. 743.

80.——Hours of Service Law.—Employment of engineer continuously for 59 days in intrastate work train service during which he was permitted to remain on duty more than 16 hours continuously held not a violation of Hours of Service Law.—United States v. Chicago, M. & P. S. Ry. Co., U. S. D. C., 219 Fed. 632.

81.——Jury.—Whether a master performed his duty as to a common laborer who was not required to inspect either a hammer or an anvil furnished him, both of which were in a defective condition, as known to the foreman, but not known by the servant, was for the jury.—Cincinnati, N. O. & T. P. Ry. Co. v. Guinn, Ky., 173 S. W. 357.

82.——Respondeat Superior.—An engineer of a construction train held to have had reason to believe that a member of the crew was in the caboose at the time he negligently collided therewith, so that the master was liable for his injuries.—Tex. & P. Ry. Co. v. Hall, Tex., 173 S. W. 548.

83.——Verdict.—All presumptions being in favor of a general verdict, it was not overthrown by answers to special interrogatories showing different conditions in deceased's place of work, which were not certain as to time.—Chicago & E. R. Co. v. Mitchell, Ind., 107 N. E. 743.

84. **Mechanic's Lien**—Landlord and Tenant.—Where it was understood between a landlord and tenant that any improvements or repairs were to be at the tenant's expense, no mechanic's lien for repairs ordered by the tenant can attach to the interest of the landlord.—Langston v. Matthews, Ark., 173 S. W. 397.

85. **Mortgages**—Election.—A mortgagee may not purchase at a sale under a power of sale, and, if he does, the relationship of mortgagor and mortgagee will continue at the election of the mortgagor.—Owens v. Branning Mfg. Co., N. C., 84 S. E. 389.

86. **Municipal Corporations**—Animals Running at Large.—Duty to keep animals from running loose on streets is governmental, the negligent performance of which does not render the town liable for the death of another animal occasioned thereby.—Town of Gainesboro v. Gore, Tenn., 173 S. W. 442.

87.——Governmental Duties.—Filthy and unsanitary condition of city lockup held not to render city liable to person arrested for violation of state law and confined therein without its authority.—Hobbs v. City of Washington, N. C., 84 S. E. 391.

88.——Police Power.—Ordinance of city of Ft. Worth, making it unlawful for white person and negro to have sexual intercourse, each act to constitute a separate offense, held not invalid, as making the violation thereof depend solely on color.—Strauss v. State, Tex., 173 S. W. 663.

89.——Street Improvement.—A city in improving streets is bound to prepare them for public use as the public necessities require and cannot convey or divert them to other uses by granting rights which interfere with the duty of preparing them to meet public necessities.—People v. Marshall Field & Co., Ill., 107 N. E. 864.

90. **Navigable Waters** — Navigability. — A stream, to be navigable, must be capable of floating vessels for the transportation of prop-

92.——Contributory.—Where plaintiff was ignorant of the character of the premises of defendant, and that his own cow fed there in danger of falling into cotton seed tunnels, he was not guilty of contributory negligence in permitting her so to feed.—Buckeye Cotton Oil Co. v. Horton, Ark., 173 S. W. 423.

93. **Partition**—Accounting.—On a bill for partition by decedent's brother and another against his wife, held error to credit her on accounting with an amount shown to have been owing decedent by his father, also deceased, whose administrator was not a party.—Miller v. Miller, Ill., 107 N. E. 821.

94.——Parol Partition.—A parol partition between an adult and an infant, followed by actual possession by the adult to the line for more than 15 years, held to estop a purchaser claiming through the infant from attacking the validity of the partition.—Henderson v. Clark, Ky., 173 S. W. 367.

95. **Partnership**—Amendment of Pleadings.—That a partnership was not specifically made a party after an amendment setting up that the members individually sued constituted the firm was immaterial, where process served on the members showed that the suit was against the firm.—Heyman v. Decatur Street Bank, Ga., 84 S. E. 483.

96. **Principal and Agent**—Implicit Power.—Where no funds are provided to pay for purchases reasonably necessary to accomplish an agency, the agent has implied power to bind his principal by a purchase on credit; but, where authorized to purchase only for cash, the principal is not bound by his purchase on credit.—White Plains Coal Co. v. Teague, Ky., 173 S. W. 360.

97.——Scope of Duty.—Where a corporation's agent is directly interested in prospective profits from a third person's purchase of personalty from the corporation, representations made by him to the purchaser relative to the personalty do not bind the corporation.—New Ware Furniture Co. v. Reynolds, Ga., 84 S. E. 491.

98. **Railroads**—License.—Resolution of board of aldermen, granting to railroad company "permission" to occupy sidewalk with a track, held to confer merely a temporary revocable license and not a perpetual and exclusive right to use the sidewalk.—Seaboard Air Line Ry. Co. v. City of Raleigh, U. S. D. C., 219 Fed. 573.

99. **Receiving Stolen Goods** — Scienter. — Where goods in the owner's possession are removed by a mere custodian, anyone purchasing them with knowldge of the circumstances is guilty of knowingly receiving stolen goods.—Komito v. State, Ohio, 107 N. E. 762.

100. **Receivers**—Expenditures.—Proposed extension of line by receiver of pipe line corporation, whereby indebtedness would be incurred, will not be authorized, where the continuance of the property in the receiver's hands could not be counted on so as to authorize expenditures based on future earnings.—Fidelity Title & Trust Co., v. Kansas Natural Gas Co., U. S. D. C., 219 Fed. 614.

101. **Sales**—Common Property.—A transfer of common property to one of the owners in consideration of payment of the price into the common fund is a sale, but a distribution of it among the common owners is not.—State v. Country Club, Tex., 173 S. W. 570.

102.——Conditional Sale.—The buyer of personalty previously sold under a conditional sale contract properly executed and recorded, purchases at his peril, where he fails to inquire bill for specific performance and disclaimed, the vendor could not urge objections that might have been asserted by H.—Waggoner v. Saether, Ill., 107 N. E. 859.

105. **States**—Litigant. — The commonwealth, when prosecuting a suit, occupies the attitude of any other litigant, and defendant may insist that the suit shall be brought and prosecuted by the person authorized by statute.—Commonwealth v. Helm, Ky., 173 S. W. 389.

106.——River Boundary.—Sand Island, in the Columbia river, near its mouth, is, and has been since the admission of Oregon as a state in 1859, a part of the territory of that state.—Columbia River Packers' Ass'n. v. McGowan, U. S. C. C. A., 219 Fed. 365.

107. **Taxation**—Bequest.—A bequest of personalty worth $42,000, with directions that what remained undisposed of at donee's death should go to testatrix's nearest of kin, vested only a life interest in the legatee, within the Inheritance Tax Law.—People v. Freese, Ill., 107 N. E. 857.

108. **Tender**—Maturity of Debt.—A debtor cannot, before the maturity of his debt, compel his creditor to accept payment, and a tender before maturity is without effect.—Shipp v. Anderson, Tex., 173 S. W. 598.

109. **Trusts**—Evidence.—A constructive trust cannot be established by merely showing that one obtaining legal title for a specified purpose on oral promise to convey to another, or to reconvey, refuses to perform or denies the trust.—Miller v. Miller, Ill., 107 N. E. 821.

110.——Gift.—Where property is purchased and title is taken in the name of the purchaser's wife or child, it will be presumed that such conveyance was made as a gift or advancement, though such presumption is rebuttable.—Kern v. Beatty, Ill., 107 N. E. 794.

111. **Vendor and Purchaser**—Removal of Timber.—The owner of the equitable title to land purchased from the state may remove the timber without liability to the owner of the naked legal title.—Sorrells v. Warnock, Ark., 173 S. W. 417.

112.——Subject to Approval.—The words "subject to approval of titles," construed with the entire contract, and held to mean that the purchasers would inquire into the seller's title and if they approved same would carry out the contract of sale.—Manning v. Sams, Ga., 84 S. E. 451.

113. **Warehousemen** — Warehouse Receipts Act.—Under Uniform Warehouse Receipts Act, §§ 4, 5, a warehouse receipt, stating that the goods were subject to the order of the depositor on surrender of the certificate properly indorsed is negotiable.—Manufacturers' Mercantile Co. v. Monarch Refrigerating Co., Ill., 107 N. E. 885.

114. **Waters and Water Courses**—Wrongful Diversion.—Where water is wrongfully diverted so as to cause overflow on another's land though some of the overflow may be temporary, damages may be allowed for any diminution in the market value caused by such permanent condition.—Louisville & N. R. Co. v. Hughes, Ga., 84 S. E. 451.

115. **Wills**—Construction. — Where testator gave his property to his wife for life, and at her death to his children or their issue, the estate on her death passed to the children or their descendants living at her death.—Brewick v. Anderson, Ill., 107 N. E. 878.

116.——Intent.—To effectuate the intent of a testator, the court can correct an obvious clerical error, transpose different parts of the instrument, or supply obviously missing words, but it

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A Treatise upon the Complex System of Constitutional Jurisprudence by which this Country is Governed

THE CONSTITUTIONAL LAW OF THE UNITED STATES

By W. W. WILLOUGHBY, Ph. D.

Professor of Political Science, Johns Hopkins University; Managing-Editor American Political Science Review; Author of "The American Constitutional System," "The Supreme Court of the United States; Its Place and Influence in our Constitutional System," "The Nature of the State," "Rights and Duties of American Citizenship," etc.

IN these two volumes is set forth in philosophical form the Constitutional Jurisprudence of the United States as developed during the 120 years since the adoption of the Constitution. The author has not sought to duplicate the work of digests by collating various constitutional decisions of the Federal Courts, but by a careful and critical study of these decisions, and of the processes of legal reasoning underlying them, *has stated the fundamental principles of American public law in so clear, so complete and so systematic a form that the work will, it is confidently believed, be at once received as the standard authority upon the complex system of Constitutional Jurisprudence by which this country is governed.*

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PROF. WILLOUGHBY is the author of several authoritative treatises upon political and constitutional subjects, is the editor of the "American Political Science Review," and head of the department of Political Science at the Johns Hopkins University.

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Central Law Journal.

ST. LOUIS, MO., JUNE 18, 1915.

CONSTITUTIONALITY OF STATUTE FORBIDDING DISCHARGE OF RAILROAD EMPLOYE WITHOUT GIVING HIM OPPORTUNITY TO MAKE STATEMENT IN HIS DEFENSE.

The Supreme Judicial Court of Massachusetts has upon request of the State Senate given its view of the constitutionality of a bill before it providing that: "No employe of a railroad corporation shall be disciplined or discharged in consequence of information affecting the employer's conduct until such employe shall have been given an opportunity to make a statement in the presence of the person or persons furnishing the information." And the court has replied that such a bill, if enacted into a statute, would be unconstitutional. In re Opinion of the Justices, 108 N. E. 807.

The Justices, in giving their opinion, rely for authority on the cases of Coppage v. Kansas, 35 Sup. Ct. 240 and Adair v. U. S., 208 U. S. 161, which declared statutes enacted by an Act of the Legislature and an Act of Congress unconstitutional, as interfering with the right of employers to discharge employes.

It was said that: "The ground upon which these decisions rest is that the freedom of contract guaranteed by the fourteenth amendment prohibits imposition of such restraints upon the right of the employer to decline to employ a person whom he does not desire." It was impossible for a majority of the Justices to say that "the right of an employer to discharge an employe because of information affecting his conduct in respect of efficiency, honesty, capacity or in any other particular touching his general usefulness, without first pro-

latter case was discussed by us in 80 Cent. L. J. 193.

Had this proposed legislation been held constitutional, it would be an entering wedge to prevent any discharge at all by employers, except upon evidence that in the opinion of a judicial tribunal would be justification therefor, creating very much of an one-sided contract in favor of employes, while it was declared in the cases referred to, that there was absolute right in employe to quit when he chose and absolute right of employer to discharge when he chose. If employer had no objection against an employe, but was exercising his right to discharge for the sake of economy, it even might be declared that a jury could determine whether or not his alleged reason was a subterfuge or made in good faith.

But all of the Justices concurred in the view that the statute was unconstitutional, because the bill was a proposition to enact legislation relative to employes of railroad corporations giving them as a class privileges not enjoyed by the rest of the community.

It was said that: "While reasonable classifications may be made by the legislature in the interests of the public health, public safety and public morals, yet there must be some rational relation between the object to be attained and the classification, in order that it may not violate the constitutional guaranty that all persons, including corporations, shall be equal in the protection afforded by the laws."

The opinion is unable to discern to what of these objects the proposed legislation has any reference whatever and the court concludes that: "There is strong ground for the conclusion that the selection of railroads as the sole object of severely criminal legislation as to a matter having no particular relation to the management of personal view as to the motive of the bill, but, generally speaking, it seems quite difficult to spell out anything that has any tendency to the conserving of safety, health or public morals, and certainly a statute of this kind militates against the freedom of contract declared in the Adair and Coppage cases.

It seems hard to reach the point, where some politicians in legislative halls or individuals therein as the tools of politicians outside, will cease seeking special privileges for labor. Labor organizations have been held to be all right under the law, but noisy agitators think they are increasing their popularity by making appeals to legislatures and Congress, which, if granted, would prove to be merely snares and delusions and interrupt the healthy growth of a good understanding between capital and labor.

NOTES OF IMPORTANT DECISIONS

CONSTITUTIONAL LAW — FORBIDDING EMPLOYMENT BUREAU TO COLLECT FEES FROM APPLICANTS.—A majority opinion and a dissent in a bench of three federal judges, sitting in district court, discusses in 23 pages of fine print the constitutionality of a state statute forbidding an employment bureau from exacting or receiving any compensation for its services in obtaining employment from applicant therefor, the majority standing for constitutionality. Wiseman v. Tawner, 221 Fed. 694..

It is of little advantage to analyze the arguments either pro or con in such a discussion. It must be admitted, that the system of fee collecting breeds many abuses and tends to make tenure of positions obtained by means of employment agencies very uncertain. It does more than this—it works for discharges of employes howsoever they may have become employed. Vacancies in employment are what these agencies feed upon.

But it must be conceded that an agency to tion. It virtually says an employment agency is only entitled to have as customers or patrons those who are seeking employes, and well it may be argued, that there is directly an opposite tendency in security of tenure of places that are filled in such a rule.

Another consideration which appears to us important is that the very groundwork of the claim of constitutionality lies in the fact that applicants for work are made "the victims of imposition and extortion" and the system "is therefore detrimental to the welfare of the state." All of this means there is "collusion between agencies and managers of employers which results in shorter time of employment to increase the number of 'jobs'." I greatly doubt whether frauds and deception in the conduct of a lawful business by rascals, who engage in it, ought to justify its prohibition altogether. If there were a statute making it penal for any manager of an employer to have an understanding with an employment agency and vice versa, this would look like a constitutional regulation of the business itself, but it is not regulation to take away all right to compensation from the business as a legitimate business.

PLEADING—FOREIGN LAW AS BASIS OF RECOVERY.—In Walsh v. Walsh, 68 So. 392, decided by Louisiana Supreme Court, one judge dissenting, there seems a liberality in pleading that ought to satisfy the hardiest opponent of all technicality.

An action was brought against a husband and wife upon a note conjointly made in Ireland. In Louisiana a married woman cannot bind herself conjointly with her husband. Plaintiff's petition alleged that "said promissory note and said deed of charge are valid instruments duly executed under the laws of Ireland and that petitioner desires to prove herein that they are such and to tender in evidence the law of Ireland in relation thereto."

If this is anything more than mere statement of a conclusion by the pleader that when a case comes on for trial he is going to submit proof of liability without stating in advance how it arose or on what facts it rested, we fail to grasp its intent. Who knows what will be submitted to support the conclusion? When it is stated that a foreign law must be proved, it is

NEW LIGHT ON WORKMEN'S COMPENSATION LAWS.

Latterly the American people are awakening to a newer and fuller realization of the value of the workmen's compensation law!

State upon state is adopting the measure; where it is not already upon the statute book the legislative committees are considering it, and down in Ohio, in Texas, in Rhode Island, in many other sections, the ambulance-chaser has vanished from the scene; his ancient, if not honorable, profession, vanished before the new compensation law.

In fact, the difference is striking: Mrs. Jack Roosa,—with her husband injured fatally at his work in the big, modern factory,—need no longer bury her grief, take her children to the nearest orphans' home, and leaving them there, time being, go out scrubbing, in order to feed and clothe their mouths and bodies, and her own. Nor, where,—with a mother's yearning—she would keep the youngsters with her, need she take in washing; fill her single room with steamy sud-smells, while she tries to make two ends meet. It's at just those psychological moments of weariness and hunger and the cry of the children, that attorneys for the factories found widows but too ready to "settle," to "accept this or nothing," and, hence, to give in. Or, again ambulance-chasers, who worked on contingencies, would manage to extract greater per cents for themselves,—on promise of greater, more successful effort!

To-day, workmen's compensation, alias industrial insurance, has changed this. The State Industrial Commission of in the United States within the last few years; and it's growth appears the more phenomenal when we reflect upon the miserable failure of the first state compensation act, when subjected to the microscopic eye of the state supreme tribunals.

"The members of the bar at large,—and their high priests, the courts,—in my humble opinion, made the mistake of viewing this new and strange form, in the early days, as a premeditated assault upon their special prerogatives and preserves;—and attorneys forthwith advised their clients, the employers, that their constitutional rights were being atrociously abridged, to the advantage of and the benefit purely of the workingman;—and perhaps naturally so;—for it has been indeed hard to reconcile ourselves as lawyers to the drastic changes which compensation laws have wrought in the principles and underlying doctrines with which we have so long been familiar.

"The employer of labor, when he first was advised of the proposed compensation laws, instantly,—I might say instinctively,—opposed the idea of being held responsible, by way of a money-settlement, for his employe's injuries, regardless of his negligence in the premises and he joined his lament with that of the lawyer.

"Then certain of the states, most notably our own, proposed a form of compensation law which took from the 'old-line' stock liability-insurance companies the right to sell liability-insurance in the states;—and then, indeed, was there a hue and cry raised, which, for a time at least, confused and influenced some men of high standing and supposed intelligence into making a vigorous campaign analyzed, will be found to rest upon sound economic, legal, social and moral foundations. The contention primarily raised,—that under the 'compensation law the employer is deprived of his property, without due process of law,' is, indeed, a fallacious one;—for more readily than before can he estimate his probable accident-cost for a current period and add it to the cost of his finished product; where, of course, it is paid by the ultimate consumer;—but in such small proportion and in such intangible fashion, as to pass unnoticed.

"The depreciation and breakage of machinery have always, without question, been a fixed physical cost of manufacture and it made no difference whether breakage was occasioned through any person's negligence or not, the machine had to be replaced, and the cost was, of course, charged to the commodity itself. Does it not seem absurd to place the human cogs in the machinery, or organization, of the factory or workshop on a plane below that of the purely mechanical appliance? Was that not, in fact, what we were wont to do but a very short time since? An injured workman's recovery depended upon the question of the legal liability of the master,—and that liability had so been hedged about with technical defenses that only a small percentage of injured employes received anything;—and, unfortunately, the human weakness of greed upon the one hand and selfishness upon the other, made the recovery, in pure liability cases, excessive;—and in non-liability cases made the settlements insufficient, or *nil*.

"One of our philosophers has said: 'Life is but a gamble and gambling is but the doctrine of the grand average.' " number of industrially-injured men, it is better that each receive, as compensation, enough of an award to live upon, in proportion to the nature of his injury and the amount of wages he was earning at the time injured,—than that a few should receive a large amount, by way of judgment,—and the majority little or nothing. The adoption of these laws came through necessity, or, at least, to satisfy a great cry, aimed at the very door of bench and bar, to-wit:—that delay, technically and even dishonesty was robbing the injured employe of his due and throwing back, as public charges upon the community, a great number of industrially-injured workmen and their dependents.

" . . . . In all fairness, I am of the opinion that our present compensation act is second to none now in force in the various states;—although, of course, it does not, in all of its elements, conform to the ideal of every student of the subject.

"The states now operating under various forms of compensation laws are New Jersey, Arizona, California, Connecticut, Illinois, Kansas, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, Ohio, Oregon, Rhode Island, Texas, Washington, West Virginia and Wisconsin,—and the matter is under consideration in the legislatures of various other states."

The Bulletin contains some interesting comments on the working out of the law by the same attorney,—as presented before a bar association meeting of the state,—from which we quote:

"First, the insurance contingent and their duped friends . . . said that the cost was excessive, under the state's published premiums, and that, moreover, through and, furthermore, as of May 1st, 1914, the Commission's bulletin contained a financial statement which shows a net surplus of . . . over a quarter of a million dollars out of a total of $2,337,276.51 of premiums collected;—and they show, further, a loss-ratio of only 82.5 per cent of their net premiums earned;—and, further, that, generally speaking, taking the average rate of each state as a basis, that for each dollar it costs the Ohio manufacturer in premiums it costs the Michigan employer $3.28 and the Wisconsin manufacturer $3.70. . . .

"The next objection advanced was that, under the provisions of the act, the employer was afforded no legal protection from suits instituted under either of the two exceptions provided in the act. First, where the servant's injury was caused by the willful act of the employer or his agent, and, second, from the failure of such employer or any of his officers or agents to comply with lawful requirements for the safety of these employes. As to the first of these questions, there was no doubt in the minds of many of the eminent lawyers of the state as to what construction should and would be placed upon the meaning of the phrase, or term, 'willful act.' . . . If judicial corrobation is a test . . . those who were dubious were vindicated in some degree by the decision of Judge Day, in the case of McSweeney v. The Standard Boiler and Plate Co. . . . The court . . . charged the jury that 'wanton negligence' might, in certain cases, be said to amount to a willful act,' and the jury, being naturally somewhat influenced by the strain placed upon the interpretation, reported a verdict for the plaintiff in the sum of $14,000."

faction and is highly appreciated by the wage-earners in Cincinnati. Compensation for injuries and deaths are paid immediately after the approval of the Board of Industrial Commission; upon report of the Director of Claims. Since the law went into effect there were 12 deaths and an average of about 30 injuries a day;—all of which have been adjusted satisfactorily to the dependents of the killed and injured.

"Another benefit,—and, in my opinion, a good one,—is that the employers are voluntarily placing safety devices around dangerous machinery and in that manner decreasing the number of injuries and increasing the protection of the worker!"

All of which would seem to indicate that, in last analysis, the workmen's compensation law has come as panacea for many of the ills that have so long harassed employer and wage-earner both;—adding its link to the long chain that serves to bind labor and capital in a new entente cordial for another, near-future day!

FELIX J. KOCH.

Cincinnati, Ohio.

TELEGRAPHS AND TELEPHONES—SPECIAL DAMAGES.

C. B. NASH CO. v. WESTERN UNION TELEGRAPH CO.

Supreme Court of Nebraska. April 16, 1915.

152 N. W. 387.

(Syllabus by the Court.)

For a breach of its contract to promptly transmit and deliver a message over its lines, a telegraph company is liable for such damages as may reasonably be supposed to have been in the contemplation of both parties at the time when the contract was made.

liver a telegram. The facts alleged in plaintiff's petition may be briefly stated as follows: At 10:10 o'clock a. m., on Thursday, January 30, 1908, the plaintiff, the C. B. Nash Company, delivered to the Western Union Telegraph Company, at its main office in the city of Omaha, the following telegram:

"Shearson, Hammill & Company, 71 Broadway, New York, N. Y. Outbreak tapestry preternatural. Collect. (Signed) The C. B. Nash Company."

Across the face of the telegram was written in red ink, "Rush." The message when translated reads:

"Sell 300 American Smelting & Refining Company common stock at 68⅛."

At the time when the message was delivered to the telegraph company, the plaintiff had on deposit with Shearson, Hammill & Co. 300 shares of the stock designated, and wished its brokers to sell the same as directed by the telegram. Had the defendant promptly transmitted and delivered the message, Shearson, Hammill & Co. would have sold the stock at a price equal to or greater than that named. On February 1, 1908, plaintiff telegraphed Shearson, Hammill & Co. to ascertain if the sale had been made, and was informed that the order to sell had not been received. On the 3d of February, 1908, plaintiff sent them a duplicate of the original message, which was received by them on the 5th day of February, 1908. Meanwhile, the price of said stock had declined to $62.50 per share, at which price the stock was sold, and plaintiff was damaged, by the failure of the telegraph company to promptly transmit and deliver the message, in the sum of $1,986, for which, with interest, the plaintiff prayed judgment. The defendant's answer was a general denial. On the trial the court limited the measure of damages to the difference between the price at which the stock would have sold on January 30, 1908, had the telegram been duly transmitted and delivered, and the price at which the plaintiff could have sold the stock on February 3, 1908. The jury returned a verdict for the plaintiff for $600, with interest amounting to $199, or a total of $799. Judgment was rendered on the verdict, and the defendant has appealed.

It appears that, before the introduction of the evidence, the defendant objected to the moved the court to direct the jury to return a verdict in its favor, claiming that there was no evidence before the court tending to show that defendant had notice of the nature and extent of the business covered by the telegram which would make defendant liable for the special damages claimed. The motion was overruled. The court also refused to instruct the jury that defendant would be liable for nominal damages only. These rulings constitute the defendant's assignments of error.

It appears that at the trial L. F. Crofoot, a witness for plaintiff, testified that he was the secretary, treasurer, and director of the C. B. Nash Company; that the company has maintained its office in the Omaha National Bank building since January 1, 1907; that the defendant company has maintained its office in the basement of the same building; that the business of the plaintiff, among other things, was the purchase and sale of stocks listed on the New York Stock Exchange; that such transactions were carried on by telegrams, wholly or partly in cipher, and open, sent and received by the Western Union Telegraph Company, through its office in the Omaha National Bank building; that such telegrams were sent to and received by Henry Clews & Co., Clark Dodge & Co., Shearson, Hammill & Co., W. P. Bonbright & Co., all New York stockbrokers; that the plaintiff company used the same cipher code in messages sent to and received by Shearson, Hammill & Co., and the object in using the code was to save tolls; that Henry Clews & Co. is one of the oldest brokerage houses in New York and has had an extensive business for many years; that Clark Dodge & Co. have also been in business for many years and are prominent brokers; that Shearson, Hammill & Co. have been in business a shorter period but are prominently known as stock brokers; that the method of sending the telegrams was to have them written in the plaintiff company's office and sent down to the telegraph company's office for transmission, or delivered to a messenger of the telegraph company. W. W. Umsted testified that for many years he had been manager of the Western Union Telegraph Company in Omaha; that the telegraph company and the C. B. Nash Company maintained offices in the same building; that, as manager of the telegraph company he had charge of all of the were large, and that it was frequently sending and receiving business messages through the telegraph company's main office; that he knew L. F. Crofoot was in charge of the plaintiff's business, and knew the C. B. Nash Company's interests were varied, and that telegrams sent and received by it related to business transactions, but he did not know whether it referred to smelter, or street railway, or to what it referred; that he could not say that any of plaintiff's messages did not relate to business transactions; that he knew that more or less of plaintiff's messages, received and sent, related to business transactions of importance; that cipher messages are common in the larger portion of all branches of important business, and are extensively used by brokers in all lines of commodities; that knowing the business in which a concern is engaged, when a message is tendered to the telegraph company, written in cipher, he knew it related to a business transaction; that when such messages are received from a business concern it is assumed that they relate to business transactions; that stock brokers use cipher messages in transacting their business in buying and selling, to a large extent, and it was a common practice for stock brokers to send and receive messages in cipher relating to their business; that he would regard the message in suit as an important message, and that it was so classed, partly because it was the C. B. Nash Company's business and partly because of the word "Rush" written in red ink across the face of the message.

The following is the substance of a stipulation of facts, introduced in evidence on the trial: For more than five years past, Shearson, Hammill & Co. have been engaged in business as stock brokers, buying and selling bonds and stocks on the New York Stock Exchange. During that time the said firm has maintained its New York office at 71 Broadway, also branch offices in the cities of Chicago and Denver. In conducting the business, said firm has seven private wires for transmission of telegrams in connection with its business, which wires are leased from the defendant. Said firm sends and receives daily, by its own operators, numerous telegrams over said wires relating to the purchase and sale of bonds and stocks on the New York Stock Exchange: Shearson, Hammill & Co. had in use, during the period mentioned, a telegraphic cipher code for sending frequently sent and received over defendant's wires during the period mentioned in paragraph 1, by Shearson, Hammill & Co. and its customers, including plaintiff. Prior to January 30, 1908, plaintiff frequently sent to and received from Shearson, Hammill & Co. messages in said code which were transmitted over defendant's lines between New York and Omaha, relating to purchases and sales of stocks. It was stipulated, however, that defendant did not admit by the stipulation, or by anything contained therein, that the defendant had knowledge or notice that any of the messages written in said code and sent and received over defendant's wires, during the period mentioned, did in fact relate to the purchase and sale of bonds and stocks or that defendant had any knowledge or notice to what said messages related. A long list of messages, sent and received by the plaintiff company to different stock brokers at different points, but more especially in New York City, was received in evidence. It appears from a translation of the code that the word "outbound" means "sell for our account and risk." The stipulation also contains the statement that William W. Remey, manager of Shearson, Hammill & Co., would testify, if permitted to do so over defendant's objection, that, had the aforesaid telegram been promptly transmitted and delivered by defendant to Shearson, Hammill & Co., his firm would have sold 300 shares of the stock in question at $68⅛ per share; that the New York Stock Exchange closed at 12 o'clock noon, Eastern time, on Saturday, February 1st, and next opened for the transaction of business at 10 o'clock a. m., Eastern time, on Monday, February 3, 1908. The foregoing is in substance the evidence on which the cause was tried.

(1, 2) Defendant's first contention is that damages for loss of an expected sale or purchase, caused by a failure to deliver a purely cipher telegram, cannot be recovered; and, second, that, if any recovery could be had, the damages would be only nominal. Appellant supports these contentions by a long list of authorities, commencing with Hadley v. Baxendale, 9 Exch. (Eng.) *341, 26 Eng. Law & Eq. 398; and it may be conceded that, if the facts justified the application of the rules invoked by the defendant, these contentions should be sustained. From an examination of the record, we are constrained to hold that the rule con-by any person in its employ. This statute was construed in Kemp v. Western Union Telegraph Co., 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363, Western Union Telegraph Co. v. Kemp, 44 Neb. 194, 62 N. W. 451, 48 Am. St. Rep. 723, and again in American Express Co. v. Postal Telegraph-Cable Co., 97 Neb. ——, 151 N. W. 240. In our opinion the evidence in this case is sufficient to bring it within the rule announced in Smith v. Western Union Telegraph Co., 80 Neb. 395, 114 N. W. 228, Western Union Telegraph Co. v. Church, 3 Neb. (Unof.) 22, 90 N. W. 878, 57 L. R. A. 905, Baldwin v. United States Telegraph Co., 45 N. Y. 744, 6 Am. Rep. 165, and Brooks & Son v. Western Union Telegraph Co., 26 Utah, 147, 153, 72 Pac. 499, 500. In the case last cited it was said:

"But the authorities hold, almost uniformly, that it is sufficient to create a liability on the part of a company for all damages directly and proximately resulting from the negligent acts of its agents in failing to transmit a message in the form in which it is delivered, or in omitting to send it at all, provided the message discloses enough of its nature and importance to put an ordinary and prudent person upon inquiry. * * * The first message herein showed on its face that it referred to a commercial transaction. This fact, together with the fact that respondent B. B. Brooks endeavored to send a second message relating to the same matter, with the word 'Rush' written conspicuously thereon, was notice to the appellant that these messages were important; and, if appellant had desired any further information on this point, it no doubt could have obtained it by inquiring of Brooks when he delivered the message to appellant for transmission over its wires."

The message in question in this case on its face, though in cipher, would furnish a person of ordinary prudence notice that it was important; and this fact, taken together with the course of business that had obtained between the plaintiff and the defendant company for many years, was sufficient notice to the defendant that substantial loss might follow its failure to promptly transmit and deliver the message to Shearson, Hammill & Co.

(3) We are therefore of opinion that the district court did not err in refusing to sus-

that it was chargeable with notice of the importance of the plaintiff's message, and that substantial loss would follow a failure to promptly transmit and deliver it.

The record being without reversible error, the judgment of the district court is affirmed.

LETTON, ROSE, and SEDGWICK, JJ., not sitting.

NOTE.—*The Hadley-Baxendale Rule in Telegraph Cases.*—While the instant case, as shown in syllabus by the court, but not in the opinion, concedes that the measure of damages against a telegraph company for failure promptly to transmit and deliver a message is according to the contemplation of both parties at the time it is sent, yet the opinion indicates a repudiation of the Hadley-Baxendale rule, which was declared with regard to carriers of freight, where special damages were sought.

The case of American Express Co. v. Postal Tel. Co. 97 Neb—151 N. W. 240 proceeds upon an interpretation of a local statute, but the case does not make it very clear how the terms of the statute admit that the damages must be those in reasonable contemplation of both parties and yet exclude such contemplation as is declared by the Hadley-Baxendale rule.

This rule (9 Exch. 341, 5 Eng. Rul. Cas. 502) was thus stated by Baron Alderson: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e. according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as to the probable result of the breach of it." This proposition so plainly just was applied to a common carrier contract where special damages of which no notice was given were claimed. Out of the sending of a telegram the same kind of losses might occur, but they are those that pertain to a special situation.

An Arkansas case which relied on Hadley v. Baxendale showed failure to deliver a telegram notifying a witness that a case had been set for a certain day, a day ten days in advance of the setting being stated in the telegram as delivered. In consequence there was a suit for his expenses and the stoppage of his business in the meantime, loss of profits, etc. The court allowed only for his expenses. Teleg. Co. v. Short 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744.

In Teleg. Co. v. Hyer Bros. 22 Fla. 637, 1 So. 129, 1 Am. St. Rep. 222, it is stated that the courts of New York, Minnesota, Maryland, Wisconsin, Massachusetts, Nevada and Maine folthat: "The weight of authority, and it seems to us the better reason is that the knowledge merely that the messages are important or that they relate to a business transaction, does not constitute such a disclosure of special circumstances as would render the defendant liable for unusual damages arising from a breach of contract."

U. S. Supreme Court also has applied H.-B. rule in a telegraph case. Primrose v. Teleg. Co. 154 U. S. 1, 38 L. ect. 883. The telegram was in cipher but it was recognized to be a business message.

In New York it was said: "Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach have been awarded for the non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance." Baldwin v. Tel. Co. 45 N. Y. 7 and 16 Am. Rep. 165.

In a Massachusetts case it was said that plaintiffs, wool merchants, gave information to the company of the importance of its message and cautioned it that unless the particular message involved in the suit was correctly transmitted, or delayed, it would result in serious loss. The court said: "In a cipher message such as this was, with no statement of any of the facts to which it related, but only information that it was very important, there would be nothing to show the nature or extent of the loss, if any, that would result from a non-delivery of it." Wheeler v. Tel. Co. 197 Mass. 119, 83 N. E. 313, 14 Am. Cas. 188. Here it is seen that the company knew that the message was a business one and very important.

We do not see why the rule in Hadley v. Baxendale should not apply in a telegraph case just as in a carrier case. Though a telegram is marked "rush," this does not advise the company of the nature of any loss that might ensue. No more is added to a telegram than is implied from resort to a message in an ordinary business transaction. Expedition is suggested, but the nature of loss is not indicated. C.

ITEMS OF PROFESSIONAL INTEREST

THE STORY OF THE KANSAS BAR ASSOCIATION.

The Bar Association of the State of Kansas was organized in Topeka, early in January, 1883, by thirty of the then leading judges and

Then it was the Association seemed to be really organized for business.

Of these early meetings very little record has been kept. The only printed story preserved to the Association of the first three years is a little pamphlet entitled, "Constitution, By-Laws, Officers and Members of the Bar Association of the State of Kansas."

January 12, 1886, a meeting was held in Topeka, the proceedings printed, including minutes, discussions and addresses. In all ways it seems to have struck the gait at this session which it has preserved and accelerated up to this time.

Since that time and including that meeting, every address and paper read before the Association has been preserved. In 1914, Mr. Herbert Clayton, of the State Library, made a very complete index and cross-index of all the work of the Association since and including the 1886 meeting, which same is now a part of the literature of the Association.

From the very start, the Association has been active and aggressive. Its influence has permeated every legislature, and in matters of law and jurisprudence has almost dominated many of them. From the very first meeting it was composed of the best lawyers and judges of the state, and well officered.

In early days the organization was made up very largely of the judges of the district court, in fact, there is tradition to the effect that the inception of the very successful organization now known as the "Kansas Bar Association" was due to and engineered by the judges of the district courts of Kansas and the justices of the supreme court. Be that as it may, the judges of both courts have always been very active and very loyal members. A few years ago the judges of the district courts called a meeting of their own the day before the annual meeting of the lawyers and have ever since had a program of their own and have been a notable adjunct. It is claimed to be the first trial judges' organization in the United States, antedating the judges' annex to the American Bar Association by several years, which was hailed as a great and novel accomplishment at its inception.

As regards the annual meetings of the Bar Association—two full days are always given over to the reading of papers, delivering of addresses, the discussion of important law

The last night a banquet adjourns the meeting *sine die* with toasts, smoking, good fellowship and a generally social time.

There are approximately 1,750 lawyers and judges in Kansas, about half of whom make a good living doing nothing else.

About 20 per cent of this number participate each year, and under the constitution they bind themselves together as an association "for the elevation of the standard of professional learning, integrity, . . . and also to cultivate fraternal relations among its members."

As stated, the beginning was in January of 1883; the meetings have been without miss or hesitancy ever since. It is now one of the oldest professional organizations in the state and it has always been pleasant and profitable to the members and to the state at large. It has done many good things; is responsible for many good laws initiated at its annual meetings, and crystallized then and there into form which afterward found way to the printed statute books.

Specifically too, might be mentioned that enlarging the supreme court from three members to seven members was one of the first and most important of its accomplishments. The nearly perfect civil code under which the state is now operating, was a conception of the Bar Association and was carried through the legislature with scarce a change by a committee appointed from the Association.

The present method of admission to the bar, of making lawyers, was the work of the Association inaugurated in 1903. Since then it has been perfected and a splendid workable scheme of unmaking lawyers, also enacted through the efforts of the Association.

Kansas now has probably one of the best and most up-to-date methods of disciplining and dismissing lawyers who forget their high obligations, of any state in the Union.

The Association has always been in splendid working harmony with the American Bar Association and has enacted into law several of the uniform statutes advocated by the parent body.

Nothing nowadays is every really done in the legislature pertaining to the bar or pro- legislature through the latter half of its session.

While it is true that only about 20 per cent of the bar of the state take active part in any of the meetings, it is further true, that under the prevailing system of membership, it is largely a different 20 per cent each year, so that within four or five years nearly all of the better lawyers of the state have taken active part in the meetings and are in close touch with its best endeavor.

Possibly an organization of such age and dignity is worthy a more careful and dignified history, together with mention of the best papers read; and the best accomplishments year by year. But within the necessary confines of a paper of this length it would not be possible to more than remotely touch in a gossippy way upon its history,—the same which this writer has very hurriedly attempted to do.

The officers of the Association for the year 1915 are: President, C. L. Kagey, Beloit, Kansas; Vice-President, Charles Blood Smith, Topeka, Kansas; Secretary, D. A. Valentine, Topeka, Kansas, and Treasurer, J. G. Slonecker, Topeka, Kansas. The executive council of the Association for 1915 are: William Osmond, Great Bend, Chairman; W. G. Holt, Kansas City, Kansas; Thomas C. Wilson, Wichita, Kansas; John C. Hogin, Belleville, Kansas, and A. S. Foulks, Ness City, Kansas.

C. L. Kagey, the president of the Association, whose portrait appears on our front cover page, was born at Newmarket, Virginia, and is thirty-eight years of age. He was educated in the public schools in Virginia and at the Polytechnic Institute, Newmarket, Virginia, after which he took a course in law at the University of Virginia, in which celebrated institution he took the debater's medal of the Washington Society for the year 1897-1898. On completing his law course in the year 1898, he came to Hays City, Kansas, where he was admitted to the bar and practiced his profession until March 4, 1899, when he was appointed county attorney of Logan county and removed to Russell Springs, Kansas. He removed to Beloit, Kansas, in 1901, and has ever since resided and practiced law in

NOTICE OF MEETING OF THE PENNSYLVANIA BAR ASSOCIATION.

The annual meeting of the Pennsylvania Bar Association will be held at the Hotel Cape May, Cape May, N. J., June 29th to July 1st, inclusive.

The President's address will be delivered by Hon. Henry J. Steele of Easton, Pa.

The following special committees, in addition to the regular committees, will make reports: Special committee on Contingent Fees, John B. Colahan, Chairman; on Revision and Unification of the Statutes, Russell Duane, Chairman; on Reform in Township Law, Rodney A. Mercur, Chairman; on Revision and Amendment of Penal Laws, Edwin M. Abbott, Chairman; on Return Days in Appellate Courts, Stevens Heckscher, Chairman; on Increase of Membership, Frederick J. Shoyer, Chairman; to Receive Complaints and Evidence in Support of Complaints Against Corporations, etc., Practicing Law Without Authority, Frederick J. Shoyer, Chairman; on Advisability of Removing the Granting of Liquor Licenses from the Courts, Hon. Harold M. McClure, Chairman.

Hon. Jas. M. Beck of New York will deliver the annual address; and a paper by Franklin Spencer Edmonds of Philadelphia, on the evening of June 30th, will discuss the subject, "Development of Constitutional Limitations on the Power of the Legislature in Pennsylvania." A paper by John C. Bane of Pittsburgh, on the morning of July 1st, will discuss the subject, "Modern Attacks Upon our Form of Government."

The Officers of the Association are as follows: President, Hon. Henry J. Steele, Easton, Pa.; Secretary, Hon. Wm. H. Staake, 648 City Hall, Philadelphia; Treasurer, Samuel E. Basehore, Mechanicsburg, Pa.

BAR ASSOCIATION MEETINGS FOR 1915—WHEN AND WHERE TO BE HELD.

American—Salt Lake City, Utah, August 17, 18 and 19.

Alabama—Montgomery, July 9 and 10.

California—San Francisco, August 23.

Colorado—Colorado Springs, July 9 and 10.

Florida—Atlantic Beach, July 23 and 24.

Indiana—July 7 and 8.

Iowa—Fort Dodge, June 24 and 25.

Kentucky—Frankfort, July 8 and 9.

Oregon—Portland, August 23, 24 and 25.

Pennsylvania—Cape May, N. J., June 29, 30 and July 1.

South Dakota—Watertown, September 1, 2 and 3.

Tennessee—Chattanooga, June 24 and 25.

Texas—San Antonio, July 1, 2 and 3.

Washington—Portland, Ore., August 23, 24 and 25.

Wisconsin—Superior, July 14, 15 and 16.

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May 1, 1915.

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Secretary, Geo. Whitelock,
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President, Ray Rushton,
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Secretary, M. A. Kline,
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HUMOR OF THE LAW

A stenographer, according to The Docket, after having written several letters to a debtor without having any reply, was asked to again call the debtor's attention to the account. Without any knowledge that the error had been made, when the letter was read before being sent out, it was discovered that the stenographer had made the following very appropriate use of the letter "f," instead of the letter "r." Instead of addressing the debtor as "Dear Sir," the stenographer addressed him as "Deaf Sir."

A young foreigner was being tried in court, says the Public Ledger, and the questioning by the lawyers on the opposite side began.

"Now, Laszky, what do you do?"

"Ven?" asked Laszky.

"When you work, of course," said the lawyer.

"Vy, work—"

"I know," said the lawyer, "but what at?"

"At a bench."

"O!" groaned the lawyer. "Where do you work at a bench?"

"In a factory."

"What kind of a factory?"

"Brick."

"You make bricks?"

"No, de factory is made uv bricks."

"Now, Laszky, listen," said the lawyer. "What do you make in that factory?"

"Eight dollars a week."

"No, no! What does the factory make?"

"I dunno; a lot uv money, I think."

"Now, listen! What kind of goods does the factory produce?"

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

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